STATE BAR OF CALIFORNIA
STAFF RESPONSE TO
RECOMMENDATIONS OF
ABA REPORT ON CALIFORNIA'S LAWYER REGULATION SYSTEM

STRUCTURE AND RESOURCES
Recommendation 2

2.1 Disciplinary Agency should continue to prioritize the handling of cases to eliminate current backlog.

Office of the Chief Trial Counsel Analysis
Agree. The Office of the Chief Trial Counsel currently uses a four–tiered priority system which assists staff in making speedy determinations of the appropriate prosecutorial action to be taken in each case. Further, the Office of the Chief Trial Counsel plans to refine each priority tier so that even more direction is provided to staff. When this revision is completed, copies will be provided to Board members as an information item.

Office of the Chief Trial Counsel Proposed Action
Continue use and refinement of current priority system.

2.2 Workload standards should include time guidelines for processing of cases with routine matters to be completed within 6 months and complex cases within 12 months.

Office of the Chief Trial Counsel Analysis
Agree. Statutory backlog time lines already exist. Business and Professions Code section 6094.5.(a) states: "It shall be the goal and policy of the disciplinary agency to dismiss a complaint, admonish the attorney, or forward a completed investigation to the Office of Trial Counsel *within 6 months* after receipt of a written complaint. As to complaints designated as complicated matters by the Chief Trial Counsel, it shall be the goal and policy of the disciplinary agency to dismiss, terminate by admonition, or forward those complaints to the Office of Trial Counsel *within 12 months*." (Emphasis added)

These time lines are not always feasible to meet; meeting them in all cases shall continue, however, to be the goal of the Office of the Chief Trial Counsel.

Office of the Chief Trial Counsel Proposed Action
Continue to strive to complete processing of routine cases within 6 months and complex cases within 12 months.

2.3 The period of time from the filing of the Notice of Disciplinary Charges ("NDC") and the State Bar Court ("SBC") judges' opinions to not exceed 6 months except for complex matters.

State Bar Court Analysis
Disagree. State Bar Court judges and management agree that all proceedings in the State Bar Court should be handled promptly and expeditiously. While the *average* pendency of all cases closed in the State Bar Court during the first half of 2001 was approximately six months, a six-month standard for the disposition of all cases (except "complex" matters) is unrealistic.

The State Bar Court has adopted the Trial Court Performance Standards promulgated by the National Center for State Courts. These Performance Standards include suggested time guidelines for the disposition of pending proceedings, which include a general guideline that the court's monthly disposition of cases should equal or exceed the number of new cases filed in the court each month and a more specific guideline that at least ninety percent (90%) of all cases should be disposed of within one year of filing. This standard is both realistic and appropriate.

In contested cases, a six-month standard for the disposition of cases would substantially limit the time available to the parties for discovery and trial preparation and deprive the State Bar Court judges of adequate time for the preparation of the required written decisions. Rule 181(a) of the Rules of Procedure provides for a discovery period of 120 days (i.e., four months) from the date of service of the Notice of Disciplinary Charges (NDC). However, formal discovery requests cannot

be served until 20 days after the response to the NDC is originally due.[1] Thus, the 120-day discovery period is, in reality, a 75-day discovery period. Rule 181(d) permits the Court to grant reasonable extensions of the discovery period.

Rule 212(a) of the Rules of Procedure requires the Clerk to provide written notice of the trial date at least 30 days in advance of trial. In addition, a pre-trial conference must be conducted not more than 45 days prior to trial. (Rule 211(d), Rules Proc. of State Bar.) At the pre-trial conference, the parties are required, among other things, to exchange witness lists and to provide copies of exhibits intended to be introduced at trial. (Rules 1223-1224, Rules Prac. of State Bar Ct.) Realistically, the parties are not prepared for the pre-trial conference until sometime after the conclusion of the discovery period. In addition to the pre-trial conference, there are frequently multiple settlement conferences conducted in an effort to resolve the matter prior to trial. (Rule 1230, Rules Prac. of State Bar Ct.) While these settlement conferences may be conducted at any stage of the proceeding, it is most likely to lead to resolution after discovery has been completed and the parties are familiar with the strengths and weaknesses of their respective cases.

There are two phases to the trial of the disciplinary proceeding, i.e., the culpability phase and the sanction phase. The State Bar Court first hears evidence regarding the alleged acts of misconduct and makes a tentative determination of culpability on some or all of the charges. If culpability is found, there is a sanction phase at which evidence regarding factors in mitigation and aggravation may be introduced. The sanction phase may either commence immediately following the conclusion of the culpability phase or there may be some time between the two phases. In some cases, the parties may also request, or the Court may require, the submission of closing briefs on disputed legal and/or factual issues presented in the proceeding.

[1]A respondent has 20 days from the service of the NDC within which to file his or her response to the NDC. (Rule 103(a), Rules Proc. of State Bar.) Because the NDC is served by certified mail, the time for filing the response is extended by 5 days if the respondent is located in California, 10 days if he or she is located outside California and 20 days if the respondent is located outside the United States. (Rule 63(a), Rules Proc. of State Bar.)

The proceeding is taken under submission by the State Bar Court at the conclusion of the sanction phase or, in appropriate cases, the submission of closing briefs. Pursuant to rule 220(b), the State Bar Court judge has 90 days within which to issue his or her written Decision.[2] The 90-day period is the same period provided for judges of courts of record to render written decisions and opinions in the matters pending before them. (*cf.*, Cal. Const., art. VI, § 19.)

Based upon the foregoing, even assuming there is no extension of the discovery period or continuance of the originally-scheduled trial date, it would be exceedingly difficult to complete every contested State Bar Court proceeding within a period of six months (*i.e.*, 180 days). The discovery period alone consumes 120 days of the 180-day period. Even assuming that the pre-trial conference could be scheduled for 5 days following the close of the discovery period (Day 125) and that the trial could be scheduled for 30 days following the pre-trial conference (Day 155) and that the trial itself could be concluded in two days with no bifurcated culpability/sanction phase and no closing briefs (Day 157), the six-month schedule could not be met unless the State Bar Court judge could prepare and file its Decision within 23 calendar days following submission.

As previously indicated, the State Bar Court judges and management fully agree that disciplinary proceedings should be processed and decided quickly and efficiently. However, the State Bar Court is, in essence, acting as a special master for the Supreme Court in these matters. A process which unfairly limits the parties' ability to conduct discovery or prepare for trial or, alternatively, deprives the Court of sufficient time to review the evidence and prepare a well-reasoned and supported Decision will seriously undermine the Supreme Court's confidence in the system.

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[2]Except for the imposition or public and private reprovals, the State Bar Court does not have final disciplinary authority. In all other cases, the Decision of the State Bar Court is a recommendation to the Supreme Court. The State Bar Court judge is required to make findings of fact and conclusions of law on the offenses charged in the NDC, make findings of fact and conclusions of law regarding mitigating and aggravating circumstances and make a recommendation to the Supreme Court regarding the appropriate discipline to be imposed. (Bus. & Prof. Code, § 6080; *In re Rose* (2000) 22 Cal.4th 430, 439-440.)

State Bar Court Proposed Action

The State Bar Court should continue to process the disciplinary and regulatory proceedings pending before it in an efficient and expeditious manner in accordance with the State Bar Court's adoption of the Trial Court Performance Standards. The Board of Governors should decline to adopt the recommendation of the ABA Consultation Team that trial proceedings should be completed with six months.

2.4 The period for appellate review generally should not exceed 6 months.

State Bar Court Analysis

Disagree. As is the case with proceedings at the trial level, State Bar Court judges and management agree that all proceedings on review before the State Bar Court Review Department should be handled promptly and expeditiously. However, the six-month period for appellate review recommended by the ABA Consultation Team is unrealistic.

The State Bar Court Review Department has adopted the Appellate Court Performance Standards promulgated by the National Center for State Courts. Those Performance Standards provide for the disposition of ninety percent (90%) of all pending appellate proceedings within one year of the filing of the request for review. This standard is both realistic and appropriate.

Pursuant to Business and Professions Code section 6086.65, subdivision (c), the Review Department of the State Bar Court may only review a decision of the State Bar Court Hearing Department upon the request of one of both of the parties to the proceeding. Only about ten percent (10%) of the contested proceedings in the Hearing Department result in a request for review to the Review Department. If no timely request for review is filed, the recommendation of the State Bar Court hearing judge is the final State Bar Court recommendation and is transmitted directly to the California Supreme Court. However, the Supreme Court will not grant a petition for review in a State Bar Court proceeding unless the petitioner can demonstrate, among other things, that he or she has exhausted the opportunity for review in the State Bar Court. (Rule 952(e), Calif. Rules of Ct.) Thus, review by

the State Bar Court Review Department is a prerequisite to the granting of a petition for review in the Supreme Court.

It is simply not possible, in the majority of cases, to complete the appellate review process within a period of six months (i.e., 180 days). The request for review must be filed within 30 days of the date the State Bar Court hearing judge's decision was served. (Rule 301(a)(1), Rules Proc. of State Bar.) In the request for review, the appellant must show that he or she has paid for, or has made arrangements for the payment of, a reporter's transcript of the proceedings conducted before the Hearing Department.[3] In the event that the respondent cannot pay the cost of the transcript, the Presiding Judge may authorize payment for the reporter's transcript in installments.[4] (Rule 301(a)(2), Rules Proc. of State Bar.)

Once the request for review and payment of the transcript is received, the reporter's transcript of the proceedings is prepared by a court reporting firm with whom the State Bar Court contracts. Preparation of the reporter's transcript normally takes approximately 30-45 days.

Upon receipt of the reporter's transcript, it is served upon the parties by the State Bar Court Clerk. In the absence of any request for an extension of time, the Appellant's Brief on Review is due 45 days following service of the transcript.[5] (Rule 302(a), Rules Proc. of State Bar.) If the Appellant ultimately fails to file his

[3]Proceedings before the Hearing Department are digitally recorded on CD-Rom disks. However, by agreement with the Supreme Court, the testimony is not transcribed unless one or both parties seek review of the hearing judge's Decision or, in other cases, upon the request of the Supreme Court.

[4]As a matter of practice, based upon a sufficient showing of financial necessity, the Presiding Judge has historically granted a respondent a period not exceeding six months within which to pay for the reporter's transcript. However, the transcript is not provided to the parties until it has been completely paid for. Therefore, in these cases, the appellate process is delayed during the installment payment.

[5]Since the record is served by mail, the time for filing briefs is extended five days where service is within the State of California. (Rule 63(a), Rules Proc. of State Bar.)

or her brief on review, the Review Department will dismiss the request for review. (Rule 302(b), Rules Proc. of State Bar.)

Thereafter, the Appellee's Brief on Review is due for filing 30 days after service of the Appellant's Brief. The Appellant may then file a rebuttal brief within 15 days following service of the Appellee's Brief.

Following the Review Department's receipt of the briefs, it analyzes the record in light of the issues and contentions raised by the parties. The amount of time necessary for this process depends, among other things, upon the size of the record, the number and complexity of the issues raised and the caseload of the Review Department.[6]

The State Bar Court Clerk is required to give the parties at least 30 days written notice of the date of oral argument in the proceeding. (Rule 304, Rules Proc. of State Bar.) Unless post-argument briefing is required, the proceeding is taken under submission at the conclusion of oral argument. The Review Department then has 90 days within which to issue its written opinion. (Rule 305(d), Rules Proc. of State Bar.)

Based upon the foregoing, it is simply not possible in most cases to complete the appellate process within six months. Even without (1) a transcript payment plan; (2) any extension of time for the parties to prepare and file briefs on review; or (3) any time for the Review Department's own review and analysis of the record and briefs prior to oral argument, it will normally take at least 250-260 days for the appellate review of a proceeding.[7]

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[6]Additionally, since at least 1994, the Review Judges (other than the Presiding Judge) have worked and have been compensated at a sixty percent (60%) of full-time basis.) In essence, the Review Judges work three days per week.

[7]This period is determined by adding (a) the time for preparation and receipt of the reporter's transcript following payment (45 days); (b) filing of Appellant's Brief on Review (45 days + 5 days for service); (c) filing of Appellee's Brief on Review (30 days + 5 days for service); (d) filing of Appellant's Rebuttal Brief (15 days + 5 days for service); (e) written notice of oral argument (30

State Bar Court Proposed Action
The State Bar Court Review Department should continue to process requests for review of disciplinary and regulatory proceedings pending before it in an efficient and expeditious manner in accordance with the State Bar Court Review Department's adoption of the Appellate Court Performance Standards. The Board of Governors should decline to adopt the recommendation of the ABA Consultation Team that appellate proceedings should be completed within six months.

2.5 Intake unit's toll–free number should be staffed full time.

Office of the Chief Trial Counsel Analysis
Agree in principle. The Office of the Chief Trial Counsel agrees that a full time toll free line is desirable. The current half day staffing of the phone line, however, represents a resource allocation decision that the Office of the Chief Trial Counsel believes best meets competing demands under the current budget.

Office of the Chief Trial Counsel Proposed Action
Continue to evaluate feasibility/ advisability of staffing toll free line full time as one potential use of limited resources.

2.5.A Lawyers and complaint analysts (CAs) should have standards and priorities for referral of matters to diversion programs

Office of the Chief Trial Counsel Analysis
Agree. Standards and priorities are currently in place for referral to, for example, state and local fee arbitration programs. The principal diversion program, the ADR program, has not been developed yet; standards guiding referral to it will certainly be developed as it becomes functional.

days); and (f) preparation and filing of Review Department opinion (90 days).

Office of the Chief Trial Counsel Proposed Action
Continue to pursue development of ADR program and all necessary related process development and training - including the development of standards and priorities for referral.

2.5.B Complaint Analysts should have additional training in mediation and dispute resolution.

Office of the Chief Trial Counsel Analysis
Agree. While some Complaint Analysts have had formal mediation training, and all have received informal on the job training dispute resolution training, additional formal training is always desirable.

Office of the Chief Trial Counsel Proposed Action
Office of the Chief Trial Counsel staff is currently evaluating training options and intends to provide formal mediation training to all Complaint Analysts. As during the year 2002.

2.6 The State Bar, as compared to the Office of the Chief Trial Counsel, should ensure appropriate cases involving lesser misconduct are addressed through diversion and alternatives to discipline program. State Bar to bring its resources and expertise to the operation of alternatives to discipline program. Prompt referral of such matters to alternative programs will permit the disciplinary agency to devote its resources to prompt investigation and prosecution of serious cases.

Office of the Chief Trial Counsel Analysis
Agree. Office of the Chief Trial Counsel supports the concept of creating alternatives to the discipline program, and appreciates the freedom to focus on serious cases that these alternatives would provide. Because Office of the Chief Trial Counsel staff supports this idea, Office of the Chief Trial Counsel itself is exploring the possibility of creating a major, outsourced alternative to the discipline program - an ADR program for mediation of minor misconduct cases.

Office of the Chief Trial Counsel Proposed Action
Continue to pursue development of ADR program and to support State Bar Court and the Bar as a whole in the development of Drug Court.

2.6.A Office of the Chief Trial Counsel to foster the vertical system as used by the special prosecutions unit.

Office of the Chief Trial Counsel Analysis
Agree. As of January 1, 2002, Office of the Chief Trial Counsel has reorganized into a more verticalized system.

Office of the Chief Trial Counsel Proposed Action
Office of the Chief Trial Counsel has taken action in accordance with this ABA recommendation.

2.7 After backlog is eliminated, Office of the Chief Trial Counsel to consider expanding verticalization of prosecutions; one possible approach is the creation of an additional specialized unit from staff to investigate and prosecute cases of minor misconduct not appropriate for referral to the alternatives of discipline program.

Office of the Chief Trial Counsel Analysis
Agree in part. As discussed above, Office of the Chief Trial Counsel as a whole has become more verticalized as of January 1, 2001. Office of the Chief Trial Counsel intends to use innovative tools for effectively processing minor misconduct cases; staff, however, does not anticipate creating a specialized unit for investigation and prosecution of such cases because limited resources require focusing on priority cases.

Office of the Chief Trial Counsel Proposed Action
Office of the Chief Trial Counsel will seek to process minor misconduct cases more effectively and efficiently than historically done (through referrals to ADR program and effective use of other discipline alternatives such as warning letters, Ethics

School, Drug Court etc.) but does not anticipate creating a specialized unit dedicated to prosecution of minor misconduct cases.

2.8 The probation monitoring program should be adequately funded and staffed.

Office of the Chief Trial Counsel Analysis
Agree in principle. Determination of an "adequate" level of funding and staffing, however, will be dependent upon in large part upon the development of the Drug Court. Staff will return to this Board committee to address this issue after the Drug Court is developed.

The issue of where probation should be located (Office of the Chief Trial Counsel, the Court, the Diversion program) is one that will need to be addressed at a later point.

Office of the Chief Trial Counsel Proposed Action
Office of the Chief Trial Counsel staff will ask the Board to consider the staffing, funding, and proper location of the probation unit after the Drug Court is in place.

STRUCTURE AND RESOURCES
Recommendation 3

3.1 Everyone in disciplinary system to receive appropriate and continuous training.

Office of the Chief Trial Counsel Analysis
Agree.

Office of the Chief Trial Counsel Proposed Action
Continue "well developed training program to educate new and existing employees." (ABA Report, at 27). Explore additions to training recommended below (Rec. 3.2-3.4).

3.2 Complaint Analysts to receive more formalized training including training on:
- **mediation**
- **public relations**
- **how to elicit information from Complaining Witnesses, Respondents, and other witnesses**
- **recognizing matters to be referred to alternatives to discipline program**

Office of the Chief Trial Counsel Analysis
Agree. Many Complaint Analysts have received formal mediation and public relations (customer service) training in the past. All Complaint Analysts have received informal training on mediation, eliciting information from witnesses, and standards of referrals of matters to, for example, fee arbitration programs. Additional formalized training is always beneficial.

Office of the Chief Trial Counsel Proposed Action
As discussed above (at recommendation 2.5.B), the Office of the Chief Trial Counsel is exploring options for mediation training for Complaint Analysts and intends to provide such training in 2002. Training on referring matters to alternatives to discipline programs is not needed at this time but will be reconsidered when the ADR program is functional. The utility of formal training

on public relations and eliciting information from witnesses will be evaluated by Office of the Chief Trial Counsel staff.

3.3 Training for new Deputy Trial Counsel (DTCs) on how to comport themselves with opposing counsel.

Office of the Chief Trial Counsel Analysis
Agree that training in courtroom conduct would be beneficial.

Office of the Chief Trial Counsel Proposed Action
Office of the Chief Trial Counsel is currently exploring options for Deputy Trial Counsel training on courtroom stylistics; Office of the Chief Trial Counsel expects this training to take place in 2002.

3.3.A Training for Deputy Trial Counsel to include time spent with private practitioners and respondents' counsel to familiarize Deputy Trial Counsel with the operation and demands of private practice.

Office of the Chief Trial Counsel Analysis
Agree in part. Office of the Chief Trial Counsel would welcome Respondents' counsel should they wish to come speak with Office of the Chief Trial Counsel staff about their experiences. Office of the Chief Trial Counsel would likewise welcome input from private practitioners regarding the challenges they face in their practice.

Office of the Chief Trial Counsel Proposed Action
Maintain an open door policy for Respondents' counsel and private practitioners to come speak with Office of the Chief Trial Counsel staff about their experiences.

3.4 Investigators to receive additional training to enhance thorough and expeditious inquiries, such as law enforcement agency courses and use of technology in gathering information.

Office of the Chief Trial Counsel Analysis
Agree. Office of the Chief Trial Counsel currently has an offer from the Los Angeles County Sheriff's Department for 40 hours free training for investigators.

Office of the Chief Trial Counsel Proposed Action
Pursue training offered by Sheriff's Department. Evaluate technology training needs of Investigators.

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STRUCTURE AND RESOURCES
Recommendation 4

4.1 Increase publicity of disciplinary and other information on State Bar's website.

State Bar Court Analysis

Agree. Within approximately the next 30 days, the information available to individuals on the State Bar's website will increase dramatically to include more detailed information concerning the disciplinary and membership status history of California attorneys. With respect to disciplinary action, the expanded information available on the website will include (a) the degree of discipline imposed (i.e., disbarment, actual suspension, stayed suspension, public reproval); (b) the year in which the discipline was imposed; and (c) the Supreme Court or State Bar Court case number. The expanded information on the website will also provide information regarding non-disciplinary status changes of members, including but not limited to (a) suspensions for non-payment of membership fees; (b) inactive enrollments for failure to pay a fee arbitration award; (c) inactive enrollments for failure to pay court-ordered family support payments; (d) suspensions for failure to comply with MALE requirements; and (e) involuntary inactive enrollments imposed pursuant to Business and Professions Code section 6007. In the future, it is our goal to provide links to make Supreme Court and State Bar Court disciplinary opinions and orders available on the website.

State Bar Court Proposed Action

Continue with implementation of the previously-approved plan for increasing the amount of disciplinary and membership status information available on the State Bar's website. Continue to investigate the cost and feasibility of making Supreme Court and State Bar Court orders and opinions available to the public on the State Bar's website.

4.2 Office of the Chief Trial Counsel and State Bar to increase efforts to better educate the public and bar members about the disciplinary process.

Office of the Chief Trial Counsel Analysis

Agree. Office of the Chief Trial Counsel is presently considering revival of Speaker's Bureau program which was successful in the past at promoting better understanding of State Bar Discipline program. Office of the Chief Trial Counsel hopes thereby to reach community groups, local bars, and law schools. Office of the Chief Trial Counsel staff also always will welcome and accept invitations to speak about the discipline program wherever they are invited to do so.

Office of the Chief Trial Counsel Proposed Action

Revive the Speaker's Bureau program. Welcome and accept invitations to address community groups, local bars and law schools.

4.3 Disciplinary agency to resume meetings with respondents' bar and Office of the Chief Trial Counsel staff to speak to local bar associations about the process.

State Bar Court Analysis

Agree. At least insofar as the State Bar Court is concerned, the new Presiding Judge (Honorable Ronald W. Staves) has offered to meet periodically with representatives of the Respondent's Bar to discuss general issues of mutual concern. Both the State Bar Court and Office of the Chief Trial Counsel currently participate in programs and speaking engagements organized by local and specialty bar associations, law schools and various civic groups and organizations in order to provide information about the attorney disciplinary process. However, representatives of the Court and Office of the Chief Trial Counsel have also indicated their interest and willingness to increase their participation in those activities and to take more initiative in making affirmative contacts with those groups and organizations to make them aware of the State Bar's availability to talk about the disciplinary process.

State Bar Court Proposed Action
Continue to work with local bars, local schools and civic groups to provide speakers and information from the State Bar Court and Office of the Chief Trial Counsel relating to the attorney discipline process.

4.4 State Bar Court judges should hold bench/bar conferences.

State Bar Court Analysis
Agree. Following the creation of the full-time State Bar Court in 1989, the Court held a series of bench/bar conferences in 1990-1992. The conferences were well-received, but as a result of increasing caseloads and declining attendance at the later conferences, the bench/bar conferences were discontinued. In San Francisco, State Bar judges continued to hold periodic "brown bag lunches" to which Office of the Chief Trial Counsel attorneys, members of Respondent's Bar and others were invited. These lunches provided the Court and regular or frequent practitioners in the Court to discuss matters of mutual interest relating to attorney disciplinary and/or the Court's procedures and practices.

The State Bar Court is considering additional bench/bar conferences in 2002 and 2003. Inasmuch as the Court has two new judges who took office in December 2001 and will have a third new member who will take office in March 2002, the Court anticipates that any bench/bar conference in 2002 will likely occur in the second half of the year.

State Bar Court Proposed Action
Continue, within budgetary and workload constraints, to plan and conduct periodic State Bar Court bench/bar conferences to educate practitioners before the State Bar Court.

4.5 Deputy Trial Counsel and State Bar Court judges to speak to the public and law students about the lawyer disciplinary system.

Office of the Chief Trial Counsel Analysis
See response to Recommendation 4.2.

Office of the Chief Trial Counsel Proposed Action
See response to Recommendation 4.2.

4.6 Disciplinary agency to produce videotapes and make available for public viewing at libraries and at law schools.

Office of the Chief Trial Counsel Analysis
Agree. Office of the Chief Trial Counsel is currently exploring the possibility of creating two videotapes. Both would provide an overview of disciplinary system from the perspective of Office of the Chief Trial Counsel; one would be done for the general public and the other for attorneys. The outcome of this effort depends upon the availability of resources for the project.

Office of the Chief Trial Counsel Proposed Action
Continue to explore possibility of creating videotapes.

4.7 The Office of the Chief Trial Counsel should notice complainants of the dismissal of their complaints and include an explanation of reasons for the dismissal and the available remedies for reconsideration.

Office of the Chief Trial Counsel Analysis
Agree. Both Business and Professions Code Section 6093.5 and Rule of Procedure 2403 require that the Office of the Chief Trial Counsel provide a complainant with information about the disposition of his/ her complaint.

Office of the Chief Trial Counsel closing letters have recently been revised to provide fuller and more case-specific explanations of the reasons for the closure.

The letters also advise complainants of the "second look" (internal reconsideration) process. Some second looks have resulted in the case being reopened. If, however, the complainant sends additional information or requests a second look, and if the second look confirms that the file was properly closed, the complainant is sent another letter advising that he or she may file a petition with the Supreme Court of California requesting that it order the State Bar to reopen the file.

Office of the Chief Trial Counsel Proposed Action
Continue to notify complainants promptly and in detail about the dismissal of their complaints, the reasons for the dismissal, and the available remedies for reconsideration.

4.8 The Office of the Chief Trial Counsel should give the complainant a copy of the respondent's response to the grievance prior to the dismissal.

Office of the Chief Trial Counsel Analysis
Disagree. The current procedure of providing a summary of an attorney's response to a complainant, but not the actual response, is appropriate.

The Office of the Chief Trial Counsel believes that the ABA's recommendation may create hostility and/or litigation between the attorney and his/ her former client, will have a chilling effect on an attorney's ability and desire to respond completely and candidly to a disciplinary complaint, and is inconsistent with the confidentiality required by law.[8]

In addition, disclosure of the response may open the door to discovery of other documents and information in the investigation file. If the response is provided, the Office of the Chief Trial Counsel could not claim that documents provided with the response should not be disclosed, or that information related to information in the response should not be disclosed. The State Bar regularly receives subpoenas for

[8]Bus. & Prof. Code § 6086.1 provides that "All disciplinary investigations are confidential until the time that formal charges are filed..." Rule 2301, Rules of Procedure also provides that the files and records of the Office of the Chief Trial Counsel are confidential.

its investigation files for use in pending civil proceedings. Providing the response will make it difficult, if not impossible, to oppose civil subpoenas for the Office of the Chief Trial Counsel's investigation files.

Office of the Chief Trial Counsel Proposed Action

Continue current procedure of providing a summary of an attorney's response to a complainant, but not the actual response.

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PROCEDURES
Recommendation 5

5.1 Rules on resignation with charges pending should be repealed. Respondents to admit culpability or have imposition of a disciplinary sanction before resignation is permitted. Respondent's action would be treated as consensual disbarment, not resignation.

State Bar Court Analysis

Disagree. Rule 960 of the California Rules of Court, which was adopted by the Supreme Court effective December 14, 1984, specifically permits a member of the State Bar against whom disciplinary charges are pending to resign from membership in the State Bar and to relinquish his or her right to practice law. Rule 960(b) sets forth the required form of the resignation, which includes an acknowledgment that disciplinary charges are pending against the member and that those disciplinary charges may be considered in connection with any petition for reinstatement that may later be filed by the member. The form of the resignation also requires the member to acknowledge that he or she will be enrolled as an inactive member of the State Bar upon the filing of the resignation and will remain ineligible to practice law until the Supreme Court accepts the resignation.

Although rule 960 of the California Rules of Court was not adopted by the Supreme Court until 1984, resignations with disciplinary charges pending have been permitted since at least 1943. In *Peterson* v. *State Bar* (1943) 21 Cal.2d 867, the Supreme Court held that a member of the State Bar is not entitled to resign as a matter of right during the pendency of a disciplinary proceeding. Rather, the Supreme Court relied upon the State Bar to recommend whether the resignation should be accepted "with prejudice" or "without prejudice." Additionally, in *Jonesi* v. *State Bar* (1946) 29 Cal.2d 181, 184, the Supreme Court held that its acceptance of a member's resignation with charges pending has the same effect as disbarment in terms of eligibility to subsequently apply for readmission to the practice of law.

Thus, the Supreme Court has permitted resignations with disciplinary charges pending for a period of nearly 50 years. Moreover, there are significant advantages to permitting a member to resign with disciplinary charges pending against the member. The primary advantage is that the member, who may be causing immediate and ongoing harm to his or her clients, is immediately removed from practice. As indicated above, a member who tenders his or her resignation from the practice of law is immediately enrolled as an inactive member of the State Bar and, as a result, is ineligible to practice law pending the acceptance of his or her resignation by the Supreme Court. By contrast, a member against whom formal disciplinary charges have been filed is normally permitted to continue to practice until the Supreme Court enters a final disciplinary order in the member's case, a process that may take some months. The length of time taken to process the proceeding to completion will be even greater if the charges against the member are still pending at the investigation stage.

Moreover, there is no advantage to be gained by requiring the member to admit his or her culpability with respect to the charges pending against the member. The resignation form signed by the member specifically acknowledges that the State Bar may consider the charges pending against the member at the time of his or her resignation in connection with any subsequent petition for reinstatement. In addition, in resignation cases, the Office of the Chief Trial Counsel may perpetuate testimony and/or documentary evidence for use in connection with a later reinstatement proceeding. (Rules 651–655, Rules Proc. of State Bar.)

Finally, only a small percentage of the attorneys who are disbarred or who have resigned with disciplinary charges pending against them subsequently seek reinstatement to the practice of law. During the last ten years (1992–2001), there have been a total of **923** resignations with disciplinary charges pending accepted by the Supreme Court and **675** disbarments ordered by the Supreme Court. By contrast, during the same 10–year period, only **63** previously disbarred or resigned attorneys have been reinstated to the practice of law.

In light of the public protection advantages of resignations with disciplinary charges pending, the availability of perpetuation proceedings and the small percentage of

disbarred or resigned attorneys being reinstated to the practice of law, there is no rational basis for adopting the recommendation of the ABA Consultation Team.

State Bar Court Proposed Action
No action should be taken on this recommendation.

Office of the Chief Trial Counsel Analysis
Disagree. The California Supreme Court has expressly endorsed the idea of the acceptance of a resignation with charges pending at any stage of a disciplinary proceeding, from the initial investigation stage, up to and including, the filing of a disciplinary decision with the Court. The resignation with charges pending, in its current form, acts as a powerful incentive to remove those attorneys who have committed serious misconduct at an earlier stage, without having to expend the resources necessary to "prove up the case" before the State Bar Court. The minimum time period to seek reinstatement following the acceptance of a resignation with charges pending is the same as that set for the imposition of a disbarment—five years.

The submission of a resignation with charges pending is currently a voluntary act by an attorney, and is a recognition that the underlying charges, if proven, could result in a disbarment or significant suspension. This procedure does protect the public, the courts and the legal profession from those attorneys who pose a threat, by encouraging them to resign at the earliest possible moment in the process.

Further, Rule 960 (c) of the California Rules of Court specifically allows for the perpetuation of testimony and states that the California Supreme Court may decline to accept the resignation with charges pending if the perpetuation of necessary testimony is not complete.

It should also be noted that in any subsequent reinstatement proceeding, the State Bar is not precluded, under the current procedure, from fully developing its case at the hearing on the reinstatement petition. If consensual disbarment was mandated, a Petitioner for reinstatement could attempt to limit any inquiry into their past misconduct to the bare factual allegations contained in the affidavit of culpability.

Moreover, the consensual disbarment and affidavit of culpability does not deal with misconduct discovered subsequent to the submission of the resignation.

Finally, if the State Bar Court is divested of jurisdiction in such matters, as contemplated under the Model Rules of the American Bar Association, it is possible that the Office of the Chief Trial Counsel would be precluded from conducting any inquiry into "post–consent" misconduct.

Office of the Chief Trial Counsel Proposed Action
No action is proposed.

5.2 Respondent should be required to verify an affidavit acknowledging the facts alleged are true and that they are entering a voluntary agreement with full knowledge of the consequences.

State Bar Court Analysis
Disagree. Requiring the attorney to verify an affidavit acknowledging that the facts alleged are true will substantially delay the processing of resignations and will in many, if not most, cases discourage the attorney from resigning, especially if the attorney is concerned that his or her admission of facts will expose the attorney to legal malpractice liability. Additionally, in cases where the charges involve conduct that may subject the attorney to criminal liability, the attorney is likely to exercise his or her constitutional privilege against self–incrimination.

A requirement of an admission of culpability or of particular facts is also inconsistent with Business and Professions Code section 6086.5, which specifically permits a member against whom a Notice of Disciplinary Charges has been filed to enter a plea of nolo contendere to such charges.

The current practice of permitting a member to resign from practice with disciplinary charges pending is much more cost-effective than the process proposed by the ABA Consultation Team. Pursuant to current practice, once a member has tendered his or her resignation from the practice of law, the Office of the Chief Trial Counsel is able to reassign its attorney and investigation resources to other

investigations or contested proceedings. If the ABA Consultation Team's recommendation were adopted, the Office of the Chief Trial Counsel's attorney resources, and potentially its investigative resources, would be required to be involved in establishing the facts and in negotiating with respect to the facts that the member is willing to admit.

State Bar Court Proposed Action
No action should be taken with respect to this recommendation.

Office of the Chief Trial Counsel Analysis
Disagree. To require the respondent attorney to admit, or acknowledge, that the alleged misconduct is true in order to resign from the practice of law will discourage most, if not all, respondents from choosing this option. This proposal by the ABA will not be cost effective and will likely lead to the need to increase disciplinary staff, while at the same time drastically reducing the number of attorneys who resign under threat of a disciplinary prosecution. This will impair rather than advance public protection. Many attorneys who would contemplate a resignation with charges pending under the current procedures will choose not to resign if they also have to admit all wrongdoing without requiring the Office of the Chief Trial Counsel to prove the misconduct by clear and convincing evidence before the State Bar Court. In some cases, respondents will be willing to admit to some of the charges and not others, resulting in much debate and delay in removing the practitioner from the practice of law. Should the Office of the Chief Trial Counsel not accept a resignation unless all of the known charges or allegations are admitted? The end result will likely be that not all the charges will be admitted in many cases or that only the least significant charges will be admitted by a resigning respondent. The proposed procedure will add little benefit, but cause substantial delay and additional cost.

Furthermore, as many of the attorneys who resign with charges pending have also committed some underlying criminal act, their admission, as part of a resignation from the State Bar could be used against them in a concurrent or subsequent criminal proceeding. Defense counsel will advise these respondents to not admit to the most serious offenses because of the potential for criminal prosecution or to not resign and to fight the charges.

Office of the Chief Trial Counsel Proposed Action
No action is proposed.

5.3 Respondent should be required to notify clients, opposing counsel and the courts of the agreed discipline imposed, consistent with Rule 955.

State Bar Court Analysis
Agree. Rule 960 of the California Rules of Court specifically requires a member who has resigned with disciplinary charges pending against him or her to comply with the provisions of rule 955(a) and (b) within thirty (30) days after filing the resignation. Rule 960 also requires the member to file proof of his or her compliance with rule 955(a) and (b) with the State Bar Court within forty (40) days after filing the resignation.

State Bar Court Proposed Action
No action on this recommendation is required.

Office of the Chief Trial Counsel Analysis
Agree. The Office of the Chief Trial Counsel believes that this recommendation is already in place. The attorney who submits a resignation with charges pending is already under a duty to comply with Rule 955, California Rules of Court, as is the attorney who is disbarred or actually suspended from the practice of law for more than ninety days. Rule 955 requires that the attorney specifically advise clients, opposing counsel and the court of the submission of the resignation with charges pending and that he or she is not entitled to practice law as of the date the resignation is lodged with the State Bar Court. The State Bar also notifies courts and public officials of the resignation and publicizes the resignation in the *California Lawyer* magazine and the *California Bar Journal*.

Office of the Chief Trial Counsel Proposed Action
No action is proposed.

PROCEDURES
Recommendation 6

6.1 Language in the Notice of Disciplinary Charges (NDC) re default warning should be amended to substitute the word "may" for "shall", *or* Rule of Procedure 103 should be amended to require the Deputy Trial Counsel (DTC) to file a motion for default and to deem the allegations of the Notice admitted.

State Bar Court Analysis

Agree. The warning language in the Notice of Disciplinary Charges (NDC) currently provides that a member's default "shall" be entered if he or she fails to file a timely response to the NDC. However, entry of default is not actually mandatory. As reflected in rule 103(d) of the Rules of Procedure, the Office of the Chief Trial Counsel currently has discretion whether to file a motion for entry of the member's default pursuant to rule 200. If the Office does not file a motion for entry of default, no default will be entered unless the member fails to appear at trial, where default may be entered by the State Bar Court pursuant to rule 201.

The State Bar Court agrees that the warning language in the NDC should be consistent with the provisions of rule 103(d). The warning language in the NDC is specifically required by statute, i.e., by Business and Professions Code section 6007, subdivision (e)(1)(B). Therefore, the State Bar Court recommends that rule 103(d) of the Rules of Procedure be amended to require the Office of the Chief Trial Counsel to file a motion for entry of the member's default within a specified number of days following the expiration of the period for filing a timely response to the NDC**.**

State Bar Court Proposed Action

Rule 103(d) of the Rules of Procedure should be amended to require the Office of the Chief Trial Counsel to file a motion for entry of the member's default within a specified number of days following the expiration of the period for filing a timely response to the Notice of Disciplinary Charges.

Office of the Chief Trial Counsel Analysis
Disagree. The ABA report accurately identifies an inconsistency in the rules of procedure. Rule 101(b)(4) requires that NDCs contain a warning that respondents "shall" be placed in default if they do not file a timely answer. However, Rule 103(d) merely states that the Office of the Chief Trial Counsel "may" file a motion for entry of default. In practice, this inconsistency is not a problem because Office of the Chief Trial Counsel routinely and promptly moves for entry of default if a respondent chooses not to participate in disciplinary proceedings.

However, there may — in very, very rare instances — be situations in which the Office of the Chief Trial Counsel might wish to hold off filing for entry of default. For example, staff might choose to delay seeking default until a respondent is released from jail. Therefore, the Office of the Chief Trial Counsel recommends that Rule 103(d) not be changed in order to allow staff the opportunity to exercise discretion when warranted.

Office of the Chief Trial Counsel Proposed Action
Take no action to amend either Rule of Procedure 101 or 103.

6.2 Hearings in default cases to only include evidence of aggravation/mitigation or any additional documentary evidence be filed with the State Bar Court (SBC). Hearing judges' default opinions to be more concise.

State Bar Court Analysis
Agree in Principle. Although rule 202(a) of the Rules of Procedure provides for an expedited hearing in default cases and permits the Deputy Trial Counsel to introduce evidence at that hearing, such hearings are exceedingly rare. Rule 202(c) provides that the Deputy Trial Counsel may submit written evidence to the State Bar Court[9] and may waive the expedited hearing. That is, in fact, what occurs in the vast majority of cases. However, the State Bar Court recommends that it would be imprudent to amend the Rules of Procedure to foreclose the possibility of a hearing

[9]The written evidence submitted by the Deputy Trial Counsel usually consists of a certified copy of the respondent attorney's prior disciplinary record. (See rule 216, Rules Proc. of State Bar.)

in the rare event that such a hearing is deemed necessary or desirable. The present practice of submitting a written waiver of the hearing in those cases where no hearing is needed works well.

With respect to making default decisions "more concise," the State Bar Court agrees that such decisions should be as concise as possible. However, in virtually all default cases, the discipline imposed or recommended exceeds the imposition of a public or private reproval and requires the approval of the Supreme Court. As a result, the State Bar Court hearing judge must make findings of fact, conclusions of law, findings about the existence of aggravating and mitigating circumstances and a recommendation regarding the degree of discipline to be imposed. (See *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 931 [State Bar Court's decision must relate findings of fact and conclusions of law to the individual facts or conduct found to violate the Rules of Professional Conduct or State Bar Act]; *Waysman* v. *State Bar* (1986) 41 Cal.3d 452, 457 [State Bar Court must consider all mitigating and aggravating circumstances]; *In re Young* (1989) 49 Cal.3d 257, 267 (fn. 11) [State Bar Court must look to the Sanction Standards for guidance re discipline]; *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311 [State Bar Court must consider whether recommended discipline is consistent with or disproportional to Supreme Court case law in cases involving similar facts]; *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776 (fn. 5) [State Bar Court must clearly state any reason for deviating from Sanction Standards or applicable case law.)

The average length of State Bar Court hearing judge decisions in default cases in 2001was 8.96 pages.[10] Only one default decision filed in 2001 exceeded 30 pages and only three decisions exceeded 20 pages. In the matter which exceeded 30 pages (*In the Matter of Malik A. Muhammad*, State Bar Court Case No. 97-O-18406, et al.), the attorney was charged with 27 separate disciplinary violations relating to six separate client matters. While State Bar Court judges continually strive to keep decisions as concise as possible, the Court does not consider the length of these decisions to be excessive but, rather, are the length necessary to deal with all factual

[10]All pleadings in the State Bar Court, including the decisions filed by the hearing judges, are on pleading paper and are double-spaced. (See rule 1110(a), Rules Prac. of State Bar Court.)

and legal issues in the case and to support the disciplinary recommendations of the judges.

State Bar Court Proposed Action
No action is necessary to implement this recommendation.

Office of the Chief Trial Counsel Analysis
Agree. The ABA task force was concerned that the State Bar was expending excess resources in proving up default cases. The Office of the Chief Trial Counsel, however, already follows the policy recommended by the ABA. The Office of the Chief Trial Counsel's policies were changed in response to similar recommendations made in 1994 by the Board of Governors' Discipline Evaluation Committee (Hon. Arthur L. Alaracon, Chair). The Rules of Procedure, however, were not changed. Thus, the ABA may have been given an incorrect impression concerning our actual practices.

In the vast majority of cases, the Office of the Chief Trial Counsel relies on the charges in the NDC. These charges are deemed admitted upon default, so there is rarely a need for additional evidence on culpability issues. The Office of the Chief Trial Counsel sometimes presents documentary evidence regarding aggravation and mitigation but to save resources, the Office prefers not to present live testimony on those issues in default cases. Moreover, the Review Department has ruled that in default cases the Office of the Chief Trial Counsel may not prove uncharged facts to support aggravation. Thus, in most cases, staff would not be permitted to present live testimony in support of aggravating circumstances.

The ABA has recommended a reduction in the length of default opinions by the Hearing Department. This suggestion is identical to the recommendation made in 1994 by the Board of Governor's Discipline Evaluation Committee (Hon. Arthur L. Alaracon, Chair).

In a response prepared by former Hearing Department Judge Alan K. Goldhammer, the State Bar Court rejected the DEC recommendation. Judge Goldhammer stated that default decisions could only be shortened by eliminating written explanations, and that this (1) would violate case law requirements, (2) would not save court resources, and (3) would encourage appeals.

The Office of the Chief Trial Counsel would be willing to accept shorter default decisions, and we believe that this could be achieved without violating case law principles. One method for achieving this would be to create a format, similar to a judicial counsel form, for default decisions. We have created a mock–up, which is attached. (See Attachment A.).

Office of the Chief Trial Counsel Proposed Action
Follow current Office of the Chief Trial Counsel procedures related to presentation of evidence in default cases. Support State Bar Court should the Court wish to explore options for shortening the length of default decisions.

6.3 Defaulting respondent to be suspended and required to petition for reinstatement, which would save future resources. Currently, low level discipline routinely results in recidivism and waste of resources.

State Bar Court Analysis
Agree in Part. In essence, the ABA consultation team's recommendation has already been in effect since March 1999. The State Bar and the State Bar Court have long recognized the potential danger to the public and to clients that is posed by attorneys who are charged with misconduct and fail to participate in the disciplinary proceedings against them.

Pursuant to Business and Professions Code section 6007, subdivision (e) and Rule 200 of the Rules of Procedure, a respondent attorney whose default has been entered in a pending disciplinary proceeding is involuntarily enrolled as an inactive member of the State Bar pending the completion of the disciplinary proceeding and the

effective date of the imposition of discipline.[11] Additionally, effective March 15, 1999, the Board of Governors adopted rule 205 of the Rules of Procedure. Pursuant to rule 205, if the State Bar Court recommends in a default proceeding that the attorney be actually suspended as a result of his or her misconduct, and the Supreme Court's adopts the Court's recommendation, the attorney will remain suspended from the practice of law for the specified period of actual suspension and until the respondent attorney files a motion with the State Bar Court seeking to terminate the actual suspension. As a condition for terminating the actual suspension, the respondent attorney must (a) explain why he or she did not participate in the underlying disciplinary proceeding; and (b) agree to comply with any probation conditions imposed by the State Bar Court that are reasonably related to the underlying misconduct. If the period of actual suspension exceeds two years, the attorney must also demonstrate his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to Standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

In 2001, the State Bar Court filed 96 decisions in cases in which the respondent did not participate and in which his default was entered. Seven (7) of those cases involved the revocation of probation, to which the provisions of rule 205 do not apply. In an additional 43 cases, the State Bar Court recommended disbarment. Of the remaining 46 default cases in which the continuing suspension provisions of rule 205 could potentially apply, the State Bar Court recommended actual suspension in 44 of those cases.

Thus, there were only two default cases in 2001 in which the State Bar Court did not recommend any period of actual suspension. In one of these matters (*In the Matter of Marilla Lane Ross*, State Bar Court Case No. 99–C–12177), the State Bar Court imposed a private reproval upon an attorney who had been convicted of a misdemeanor violation of Penal Code section 148(a) [resisting, delaying or obstructing a police officer].

[11]Only active members of the State Bar are entitled to practice law. (Bus. & Prof. Code, § 6125.)

In the second matter (*In the Matter of Lawrence Edwin Gale*, State Bar Court Case No. 00-O-11822), the State Bar Court imposed a public reproval upon an attorney who had been admitted to practice for 30 years and had no prior record of discipline as a result of the Court's conclusion that the attorney had failed, in one client matter, to competently perform legal services, communicate with his clients and promptly return the client file. The attorney was also found culpable of improperly withdrawing from employment in that client matter and of failing to cooperate with the State Bar's disciplinary investigation of the client's complaint. In this case, the Office of the Chief Trial Counsel had recommended the imposition of a public reproval.

The Supreme Court has repeatedly stated that there is no fixed formula for the imposition of discipline in California and that the discipline to be imposed in each case should be determined by the particular circumstances of that case. (See, e.g., *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 822 (fn. 7).) In *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074, 1080, the Supreme Court held that the defaulting respondent should bear the adverse consequences of his non-participation in the disciplinary proceeding (i.e., admission of the charged misconduct and exclusion from the proceeding) but he or she should not be "doubly punished" by finding that his or her failure to appear at the hearing constitutes an aggravating circumstance that warrants disbarment.

The State Bar Court does not believe that any modification to Rule 205 of the Rules of Procedure is either necessary or desirable. While the culpability found in the vast majority of default cases warrants the imposition of some period of actual suspension and invocation of the continuing suspension provisions of Rule 205, there are a few cases in which the charged misconduct is so minor or the mitigating circumstances are so compelling, that no period of actual suspension is warranted.

State Bar Court Proposed Action
No action is necessary with respect to this recommendation.

Office of the Chief Trial Counsel Analysis
Agree. During the course of investigation and disciplinary proceedings, Office of the Chief Trial Counsel sends at least four communications to respondents,

including two by certified mail. Thus, defaulting respondents have deliberately ignored the State Bar by either (1) refusing to participate despite receiving actual notice or (2) moving from their address of record without providing a forwarding address.

Office of the Chief Trial Counsel sometimes appeals lenient disciplinary recommendations in default cases, and normally prevails on those appeals. Appeals, however, require a significant expenditure of resources. Therefore Office of the Chief Trial Counsel often accepts the low level recommendations, confident the respondent will not comply with client notification requirements of Rule 955 of the California Rules of Court, and that we will eventually disbar him/her for that violation. This strategy, however, results in multiple disciplinary proceedings and a very considerable waste of resources.

As part of the reforms recommended by the Honorable Elwood Lui (the Supreme Court's Bar Monitor), the State Bar has adopted a procedure whereby defaulting respondents must petition for reinstatement before they resume active practice (Rule 205). Under this procedure, defaulting respondents are placed on suspension until they appear before the hearing department and agree to comply with appropriate conditions of probation.

In addition, attorneys who are suspended for longer than two years must prove that they are rehabilitated and possess current knowledge and learning in the general law (Standard 1.4(c)(ii)), Standards for Attorney Sanctions for Professional Misconduct).

We agree that these procedures do not go far enough. In response to the DEC recommendations, the State Bar Court proposed a procedure whereby upon entry of default the case would be abated for a time and, if the attorney did not come forward at the end of that time, his or her license to practice law would be revoked. (The result would be similar to disbarment.)

We believe that enactment of a statute along these lines would be an appropriate way to address all of the issues raised by the ABA concerning the State Bar Court's decisions. Specifically, the State Bar Court default decisions would become quite

short (in fact they would be boilerplate); defaulting respondents would be removed from practice for longer periods of time; and the expenditure of resources would be drastically reduced.

Another possible solution would be to set a minimum level of discipline to be imposed when a respondent defaults. A statute could be enacted requiring the State Bar Court to impose a minimum suspension of two years and disbarment for defaulting respondents with a prior record of discipline.

These proposals would have two side benefits. First, they would reduce the length of hearing department decisions in default cases: far less analysis and explanation would be necessary since the disposition would normally be obvious. Second, the proposals would reduce the numbers of default cases by encouraging respondents to participate. A respondent facing either license revocation or a very long suspension would be much more likely to participate in disciplinary proceedings than one facing only a short period of suspension.

Office of the Chief Trial Counsel Proposed Action

Support enactment of a statute whereby upon entry of default the case would be abated for a time and, if the attorney did not come forward at the end of that time, his or her license to practice law would be revoked, and/ or support setting of a minimum level of discipline to be imposed when a respondent defaults.

STATE BAR OF CALIFORNIA
STAFF RESPONSE TO
RECOMMENDATIONS OF
ABA REPORT ON CALIFORNIA'S LAWYER REGULATION SYSTEM

STRUCTURE AND RESOURCES
Recommendation 7

7.1 Waivers of Confidentiality: Amend the State Bar Act and Rule 2302 to allow only the Chief Trial Counsel (CTC), not the Board of Governors (BOG) President, to disclose pendency of a matter under investigation.

Office of the Chief Trial Counsel Analysis
Agree. This recommendation recognizes the importance of holding inviolate the unfettered prosecutorial discretion of the Office of the Chief Trial Counsel. A system that might result in a waiver against the advice of the Chief Trial Counsel could jeopardize the office's prosecutorial discretion.

Proposed Action
Support amendment of State Bar Act and Rule 2302 to allow only the Chief Trial Counsel to disclose pendency of a matter under investigation.

PROCESSES
Recommendation 8

8.1 Once an Early Neutral Evaluation Conference (ENEC) is requested, steps should be taken to ensure its prompt scheduling.

State Bar Court Analysis
Agree. The State Bar Court makes every effort to ensure that the Early Neutral Evaluation Conferences (ENECs) are scheduled within fifteen (15) days of the receipt of the request. However, due to scheduling limitations, that is not always possible. When coordinating the schedules of (1) a hearing judge; (2) Deputy Trial Counsel; (3) respondent; and (4) possibly, the respondent's counsel, if may be difficult to schedule a 2-hour ENEC within fifteen (15) days of the request. Whenever ENECs are scheduled beyond the 15-day deadline, it is done with the consent of all parties.

State Bar Court Proposed Action
No action is necessary.

Office of the Chief Trial Counsel Analysis
Agree. Deputy Trial Counsel are instructed to immediately schedule an ENEC consistent with the Court's calendar.

Office of the Chief Trial Counsel Proposed Action
Office of the Chief Trial Counsel to continue to work with the Court in scheduling ENECs as quickly as possible.

8.2 The Early Neutral Evaluation Conference (ENEC) should not be the first opportunity for Deputy Trial Counsel (DTCs) to obtain information from respondents.

State Bar Court Analysis

Agree. In its current form, rule 75 of the Rules of Procedure requires the Deputy Trial Counsel to provide the ENEC judge with a copy of the draft Notice of Disciplinary Charges prior to the Early Neutral Evaluation Conference. Rule 75 does not require either the State Bar or the respondent attorney to provide the opposing party with copies of any documents. The State Bar Court agrees that ENECs will be most valuable and most likely to lead to a prompt and effective resolution if the parties exchange as much information as possible prior to the Conference.

On the other hand, if Rule 75 were amended to require the exchange of documents or information and, if the ENEC could not be held unless and until such information is exchanged, it is conceivable that a significant number of respondent attorneys would never make the required exchange of information and the ENEC would not be held. In the long range, this could prove to be counter–productive since the Office of the Chief Trial Counsel would have no choice but to file the Notice of Disciplinary Charges and all parties would then be required to be engaged in the formal disciplinary proceeding.

State Bar Court Proposed Action

No action is necessary.

Office of the Chief Trial Counsel Analysis

Agree. Office of the Chief Trial Counsel staff requests information and documents from respondents at all stages of inquiry and investigation. Respondents are required to cooperate with the investigation. However, not all respondents comply with the requests. Accordingly, Office of the Chief Trial Counsel is currently using investigative subpoenas more aggressively than previously to obtain documents from respondents who fail to respond to Office of the Chief Trial Counsel requests (see below, Recommendation No. 8.3, for further discussion).

Office of the Chief Trial Counsel Proposed Action
Continue to request information and documents from respondents. Use investigative subpoenas when respondents fail to respond to the Office of the Chief Trial Counsel requests.

8.3 Deputy Trial Counsel (DTCs) in the General Investigations Unit should exercise subpoena power to compel recalcitrant respondents to provide information. General Investigations Unit to proactively investigate its cases, and Deputy Trial Counsel (DTC) to continue to provide respondents with all unprivileged information.

Office of the Chief Trial Counsel Analysis
Agree. The investigative subpoena power bestowed by Business and Professions Code section 6049(b) and Rule 2502 of the Rules of Procedure of the State Bar of California has been underutilized by the Office of the Chief Trial Counsel. While the office routinely exercises its investigative subpoena power to obtain documents from third parties such as financial institutions, it seldom exercises its investigative subpoena power against respondents. Deputy Trial Counsel should exercise subpoena power to compel recalcitrant respondents to provide information via the production of documents and depositions when warranted.

The Office of the Chief Trial Counsel agrees that investigators should be encouraged to investigate their cases proactively. Investigators should not rely on complainants' or respondents' versions of the facts and passively include such "facts" in the investigative reports without verifying or corroborating those facts. Investigators should be encouraged to expand the scope of their investigations to add potential violations when it appears appropriate to do so. Finally, investigators should be encouraged to do field work whenever it appears it would aid the quality and/or efficiency of the investigation.

The Office of the Chief Trial Counsel agrees that Deputy Trial Counsel should continue to provide respondents with all unprivileged information.

Office of the Chief Trial Counsel Proposed Action

Provide direction and training to Office of the Chief Trial Counsel staff instructing them to (1) use investigative subpoenas when respondents fail to respond to Office of the Chief Trial Counsel requests and (2) increase proactive investigation of cases. Continue to provide respondents with all unprivileged information.

PROCESSES
Recommendation 9

9.1 Requirements of Rules 182 and 211 to be merged and expanded to ensure that pretrial conferences (PTCs) are regularly utilized, without discouraging parties from communicating and cooperating on discovery issues.

State Bar Court Analysis
Agree. This recommendation duplicates what already occurs in the State Bar Court. No rule change is required to implement this recommendation.

At the time a new proceeding is initiated in the State Bar Court, the matter is assigned to a hearing judge and an initial status conference is scheduled with thirty (30) days (or sooner in expedited matters). Periodic status conferences are designed to allow the assigned hearing judge to monitor and manage the case towards resolution or trial.

While each judge manages his or her caseload pursuant to the judge's individual style, the hearing judges all conduct regularly-scheduled pretrial events to ensure that those matters are proceeding expeditiously. These pretrial events include status conferences, pretrial conferences and settlement conferences. Moreover, these conferences are proven to be effectively tools in managing the State Bar Court's caseload. In 2001, approximately 65% of all cases were resolving by stipulation prior to trial. Additionally, the average pendency of cases in the State Bar Court is less than six months.

State Bar Court Proposed Action
No action is necessary.

Office of the Chief Trial Counsel Analysis
Recommendation Nos. 9.1 through 9.2.B are responded to together below, under Recommendation No. 9.2.B.

Office of the Chief Trial Counsel Proposed Action
Recommendation Nos. 9.1 through 9.2.B are responded to together below, under Recommendation No. 9.2.B.

9.2 After the answer to a Notice of Disciplinary Charges (NDC) is filed, the new Rule should provide the initial pretrial conference (PTC) to be conducted within 15–20 days. Subsequent pretrial conferences (PTCs) to be held as necessary to ensure the expeditious progress of a case.

State Bar Court Analysis
Agree. Again, this already occurs in the State Bar Court, although the Court refers to these court events as "status conferences" rather than "pretrial conferences." Rule 1210 of the Rules of Practice of the State Bar Court requires the assigned hearing judge to hold an initial status conference within 45 days of the filing of the initial pleading. Pursuant to rule 103 of the Rules of Procedure, the respondent attorney has 20 days from service of the Notice of Disciplinary Charges within which to file his or her response to the NDC. Since service of the NDC is made by certified mail, the time within which the respondent may file a timely response is extended by an additional 5 days if the service is within California.

Thus, rule 1210 of the Rules of Practice currently requires the initial status conference to be conducted within approximately 20 days after the answer to the NDC is due. In practice, however, the initial status conference is typically scheduled within approximately 30 days of the filing of the initial pleading. Likewise, as previously stated, the hearing judges hold periodic status conferences, pretrial conferences and settlement conferences, all of which are aimed at either resolving the proceeding without the necessity of a contested trial or, alternatively, ensuring that the matter proceeds to trial in a fair and expeditious manner.

State Bar Court Proposed Action
The proposed new Rule of Procedure recommended by the ABA Consultation Team is unnecessary. No action is needed to implement this recommendation.

Office of the Chief Trial Counsel Analysis
Recommendation Nos. 9.1 through 9.2.B are responded to together below, under Recommendation No. 9.2.B.

Office of the Chief Trial Counsel Proposed Action
Recommendation Nos. 9.1 through 9.2.B are responded to together below, under Recommendation No. 9.2.B.

9.2A Subsequent to each pretrial conference (PTC), the judge should enter an order setting forth his/her actions and any agreements between the parties.

State Bar Court Analysis
Agree. This is another practice that is already in place in the State Bar Court. Rule 1211 of the Rules of Practice of the State Bar Court requires the assigned judge, after each status conference, to prepare and enter a status conference order reflecting what had occurred at the status conference. Any orders or directions contained in the status conference order govern all further proceedings in the case. Rule 1210 requires copies of these status conference orders to be served on all parties who have appeared in the proceeding.

Rule 1226 of the Rules of Practice of the State Bar Court requires the assigned hearing judge to make such pretrial orders at or following the pretrial conference as may be appropriate. Rule 1226 provides that these pretrial conference orders control the subsequent course of the proceeding.

State Bar Court Proposed Action
Existing Rules of Practice of the State Bar Court already require State Bar Court hearing judges to issue appropriate orders following status conferences and pretrial conferences. No action is necessary to implement the ABA Consultation Team's recommendations.

Office of the Chief Trial Counsel Analysis
Recommendation Nos. 9.1 through 9.2.B are responded to together below, under Recommendation No. 9.2.B.

Office of the Chief Trial Counsel Proposed Action
Recommendation Nos. 9.1 through 9.2.B are responded to together below, under Recommendation No. 9.2.B.

9.2B Routine pretrial conferences (PTCs) allow the judge to familiarize her/himself with the evidence before the trial.

State Bar Court Analysis
Agree. As previously indicated, it is the regular and consistent practice of the State Bar Court hearing judges to hold periodic status conferences and at least one pretrial conference to allow the hearing judge to manage the case towards trial or other resolution, keep informed of the status of the case and assist the parties in preparing for trial. The State Bar Court has found, through its considerable experience over the last 12 years that the Court has operated, that cases are most likely to be resolved when the parties have completed their discovery and preparation for trial. Therefore, by focusing the parties' attention on the completion of discovery, resolution of disputed issues and the preparation for trial, the Court is in the best position to either aid in the ultimate disposition of the case or, alternatively, conducting the contested trial in an efficient and effective manner.

State Bar Court Proposed Action
State Bar Court hearing judges already conduct periodic status conferences and pretrial conferences. No modification of the rules or practices of the State Bar Court are required to implement this recommendation.

Office of the Chief Trial Counsel Analysis
Disagree. The recommendation is unnecessary. The ABA recommendation appears not to have taken into account the provision for status conferences set forth in rules 1210 or 1211 of the Rules of Practice of the State Bar Court.

Rule 1210 provides for an initial status conference within 45 days of the filing of the initial pleading. At this status conference the parties shall be prepared to discuss jurisdiction and venue, the substance of claims and defenses, disputed issues, anticipated motions, discovery and discovery cut-off, further status conferences, settlement conferences, pretrial and trial issues, modification to standard procedures, compliance with rules of procedure and practice, prospects for settlement and any other matter which may be conducive to the just, efficient and economical determination of the proceeding. Any number of additional status conferences may be held at the request of a party or the court. In most cases, multiple status conferences are set during the course of the litigation.

Rule 1211, Rules of Practice provides that the assigned judge shall enter an order, which shall be served on all parties, reflecting the discussions held at the status conference. The order shall control the proceedings unless later modified.

Under the Rules of Procedure and Rules of Practice a pretrial conference has a specific purpose and is held shortly before trial.

Office of the Chief Trial Counsel Proposed Action
Continue with current system of status conferences and pretrial conferences as provided for in relevant part by Rules 1210 and 1211 of the Rules of Procedure of the State Bar Court.

PROCEDURES
Recommendation 10

10.1 Sections 6007(c)(1) through (4) of the Business and Professions Code and Rules 460 *et seq.* should be amended to expedite and simplify the process.

State Bar Court Analysis

Disagree. Business and Professions Code section 6007, subdivision (c) authorizes the State Bar Court to order the involuntary inactive enrollment of an attorney whose conduct poses a substantial threat of harm to the attorney's clients or the public. In effect, this inactive enrollment operates as a temporary suspension from the practice of law, which may continue for as long as a year while the underlying disciplinary proceeding is being heard and decided.

In order to find that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or the public, the State Bar Court must find each of the following factors by clear and convincing evidence:

a) The attorney has caused or is causing substantial harm to the attorney's clients or the public;

b) The attorney's clients or the public are likely to suffer greater harm from the denial of the involuntary inactive enrollment than the attorney is likely to suffer if it is granted or there is a reasonable likelihood that the harm will recur or continue; and

c) There is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter.

While the availability of this proceeding is essential for the protection of the public, it is a draconian remedy that has an immediate and devastating impact upon the respondent attorney's practice. The current procedures applicable to these

proceedings seek to balance the need for immediate public protection against the attorney's right to some measure of due process and an opportunity to respond to the charges.

The involuntary inactive proceedings pursuant to Business and Professions Code section 6007, subdivision (c) are extraordinarily expedited. (Rule 464, Rules Proc. of State Bar.) The attorney has only 10 days within which to file a verified response to the application for involuntary inactive enrollment and to request a hearing. (Rule 462, Rules Proc. of State Bar.) Failure to file a timely response or to timely request a hearing constitutes a waiver of the right to a hearing. (Rule 462, Rules Proc. of State Bar.) If held, the hearing is conducted on an expedited basis (*i.e.*, within 30 days of the date the application was filed) and must be completed as soon as practicable and without interruption, except for good cause shown. (Rule 464, Rules Proc. of State Bar.) Evidence received at the hearing is by declaration, request for judicial notice and transcripts, without testimony or cross-examination, except for good cause shown. (Rule 465(a), Rules Proc. of State Bar.) A party seeking permission to present oral testimony must file and serve a request no later than 3 days prior to the hearing and must set forth the substance of the proposed testimony, the names and addresses of the witnesses and the time estimated for their testimony. (Rule 465(a), Rules Proc. of State Bar.) The State Bar Court must issue its decision no later than 10 court days after submission. (Rule 466(a), Rules Proc. of State Bar.) If inactive enrollment is ordered, it is effective 3 days after service of the decision by mail.[12] (Rule 466(b), Rules Proc. of State Bar.)

The California Supreme Court has upheld the constitutionality of these proceedings. (*Conway* v. *State Bar* (1989) 47 Cal.3d 1107.) In doing so, however, the Court emphasized that the procedures governing these inactive enrollment proceedings provide sufficient constitutional protections to the attorney, including (a) adequate notice of the charges; (b) the power to subpoena witnesses and documents; and (c)

[12]If inactive enrollment is ordered, the underlying disciplinary proceeding must be brought and heard on an expedited basis. The underlying proceeding, including appellate review by the State Bar Court Review Department, must be completed within one year of the effective date of the inactive enrollment. (*Conway v. State Bar, supra*, 47 Cal.3d at p. 1121; see also, rule 482(f), Rules Proc. of State Bar.)

a fair opportunity to prepare and present a defense. (*Conway* v. *State Bar*, *supra*, 47 Cal.3d at pp. 1115-1117.)

In light of the foregoing, the State Bar Court does not believe that any changes in the current procedures are necessary or advisable. The proceedings are already expedited and are not overly burdensome or complicated. No hearing is required to be held unless requested. These proceedings are reserved for the most egregious circumstances; only 7 of these proceedings have been filed in each of the last 3 years (i.e., 1999-2001). Any significant curtailment of the respondent attorney's ability to respond to the allegations of the application or to present evidence to rebut the evidence submitted by the Office of the Chief Trial Counsel will inevitably result in legal challenges to the constitutionality of the modified procedures. The constitutionality of the current procedures has been upheld and appropriate balance public protection with the due process rights of respondent attorneys.

Office of the Chief Trial Counsel Analysis

Disagree. The requirements of the current statute are not unduly burdensome. Due to the 1998 shut down of the Bar, and the extraordinary measures required to rebuild Office of the Chief Trial Counsel after the shut down, Office of the Chief Trial Counsel was unable to dedicate the resources needed to prosecute as many 6007(c) applications as in the past. Recently, however, Office of the Chief Trial Counsel created a special "fast track" team with the explicit function of quickly identifying attorneys who pose a substantial risk of harm to the public, investigating their matters and filing 6007(c) applications.

State Bar Court Proposed Action

No action is proposed with respect to this recommendation.

Office of the Chief Trial Counsel Proposed Action

No action is proposed. Office of the Chief Trial Counsel staff is happy to provide the Board Committee on Regulations, Admissions and Discipline with a more detailed report on the structure and functioning of the Fast Track team should the Committee request it.

10.1A Certain serious misconduct, such as ongoing conversion of client funds should warrant "immediate suspension."

State Bar Court Analysis
Disagree. To the extent that the ABA Team's recommendation is that the remedies available pursuant to Business and Professions Code section 6007, subdivision (c) should be applicable to misconduct such as the ongoing misappropriation or conversion of client funds, that is already the case. However, we understand the ABA Team's recommendation to mean that an attorney who appears to be engaged in the ongoing conversion of client funds should be subject to "immediate suspension" without notice and without a hearing. In that event, the State Bar Court disagrees with the recommendation because they do not provide even minimal due process to the respondent attorney.

Office of the Chief Trial Counsel Analysis
Recommendation Nos. 10.1A through 10.2B are responded to together below, under Recommendation No. 10.2B.

State Bar Court Proposed Action
No action is proposed with respect to this recommendation.

Office of the Chief Trial Counsel Proposed Action
Recommendation Nos. 10.1A through 10.2B are responded to together below, under Recommendation No. 10.2B.

10.2 The Office of the Chief Trial Counsel should transfer sufficient evidence with a proposed order to the regulatory court for immediate involuntary inactive enrollment.

Office of the Chief Trial Counsel Analysis
Recommendation Nos. 10.1A through 10.2B are responded to together below, under Recommendation No. 10.2B.

State Bar Court Analysis
Recommendation Nos. 10.2 through 10.2B are responded to together below, under Recommendation No. 10.2B.

Office of the Chief Trial Counsel Proposed Action
Recommendation Nos. 10.1A through 10.2B are responded to together below, under Recommendation No. 10.2B.

State Bar Court Proposed Action
Recommendation Nos. 10.2 through 10.2B are responded to together below, under Recommendation No. 10.2B.

10.2A The Office of the Chief Trial Counsel should provide respondent with notice of filing, which may be by telephone.

Office of the Chief Trial Counsel Analysis
Recommendation Nos. 10.1A through 10.2B are responded to together below, under Recommendation No. 10.2B.

State Bar Court Analysis
Recommendation Nos. 10.2 through 10.2B are responded to together below, under Recommendation No. 10.2B.

Office of the Chief Trial Counsel Proposed Action
Recommendation Nos. 10.1A through 10.2B are responded to together below, under Recommendation No. 10.2B.

State Bar Court Proposed Action
Recommendation Nos. 10.2 through 10.2B are responded to together below, under Recommendation No. 10.2B.

10.2B Hearings on applications for involuntary inactive enrollments should be eliminated.

State Bar Court Analysis

Disagree. The State Bar Court disagrees with the ABA Consultation Team's assertion that the elimination of any opportunity for a hearing and elimination of the actual service of the application for inactive enrollment upon the respondent attorney comports with concepts of minimal due process. As indicated above, although the Supreme Court upheld the constitutionality of the inactive enrollment proceedings in *Conway* v. *State Bar*, *supra*, the Court identified and emphasized the protections provided to the attorney before his or her license to practice could be "temporarily suspended" for a period of up to one year, including (a) advance notice of the hearing; (b) an opportunity to subpoena witnesses; and (c) adequate time to prepare and present a defense. The measures recommended by the ABA Consultation Team would eliminate or severely limit these crucial protections. Proceedings under Business and Professions Code section 6007, subdivision (c) are extremely expedited and are normally completed within a period of approximately forty-five (45) days from filing.

Office of the Chief Trial Counsel Analysis

Disagree. The Office of the Chief Trial Counsel disagrees with these recommendations, as the procedures recommended (telephonic notice and immediate involuntary inactive enrollment without a hearing) would most likely not satisfy due process requirements.

Should the Board wish to seek such changes, however, it may be preferable to approach the Supreme Court for a new rule or rules of court rather than to seek new legislation. This approach would ensure that any such change would be acceptable to the Court on due process grounds. The Supreme Court has already delegated to the State Bar the authority to suspend members in certain situations (interim suspension of a qualifying crime, suspension for failure to comply with MCLE requirements, and suspension for failure to take and pass the professional responsibility examination).

A new rule of court could authorize suspension of members in additional situations such as: a criminal indictment or preliminary hearing finding involving a felony, or a finding by the State Bar Court (after a discipline hearing or a hearing on a 6007(c) application) that $5,000 or more of client funds are missing or being unlawfully held by the respondent and that respondent has been unable to rebut that finding.

State Bar Court Proposed Action
No action is proposed with respect to these recommendations.

Office of the Chief Trial Counsel Proposed Action
No action is proposed.

10.3 State Bar Act rules which require the State Bar Court to consider who is likely to suffer greater injury if petition denied should be eliminated.

State Bar Court Analysis
Disagree. The ABA Consultation Team recommends the elimination of the statutory requirement that the State Bar Court weigh whether the public is likely to suffer greater harm from the denial of the involuntary inactive enrollment than the attorney will suffer if the enrollment is ordered. The basis for the ABA Team's recommendation is that "[t]he interests of clients and the public in cases like these are paramount to the potential arm to the lawyer engaging in such serious misconduct."

The State Bar Court agrees that the protection of the public is at the very heart of the purpose of the discipline process itself. In cases where the evidence establishes that the public or client harm is continuing or is likely to recur, the need to protect clients and the public will always outweigh the interests of the respondent attorney. In other cases, however, where the evidence is ambiguous or there is no evidence that the misconduct is continuing or likely to recur, a balancing of the public interest versus the interest of the attorney in being permitted to continue practicing while his or her disciplinary proceeding is being processed is appropriate.

Moreover, the requirement of Business and Professions Code section 6007, subdivision (c)(2)(B) is in the alternative. That is, the evidence must show either that (1) the attorney's clients or the public are likely to suffer greater injury from the denial of the involuntary inactive enrollment than the attorney is likely to suffer if it is granted; or (2) there is a reasonable likelihood that the harm will recur or continue. Thus, in **all** cases in which the evidence is sufficient to demonstrate that there is a reasonable likelihood that the harm will recur or continue, involuntary inactive enrollment is appropriate. It is only in those cases where the evidence is insufficient to demonstrate the likelihood that the harm will recur or continue that the balancing of harm must be considered as a prerequisite to the inactive enrollment. In the State Bar Court's view, maintenance of this balancing test is appropriate.

Office of the Chief Trial Counsel Analysis
Agree. The Office of the Chief Trial Counsel agrees with the recommendation. Alternatively, it may be appropriate to seek a rule of court from the Supreme Court detailing the factors the State Bar Court should consider in balancing the harm.

State Bar Court Proposed Action
No action should be taken on this recommendation.

Office of the Chief Trial Counsel Proposed Action
Support elimination of State Bar rules which require the State Bar Court to consider who is likely to suffer greater injury if petition is denied. Alternatively, consider seeking a rule of court from the Supreme Court detailing the factors the State Bar Court should consider in balancing the harm.

PROCEDURES
Recommendation 11[13]

11.1 The Review Department of the State Bar Court should adopt a more deferential standard of review in its review of disciplinary matters.

State Bar Court Analysis
Recommendation Nos. 11.1 and 11.2 are responded to together below, under Recommendation No. 11.2.

Office of the Chief Trial Counsel Analysis
Recommendation Nos. 11.1 and 11.2 are responded to together below, under Recommendation No. 11.2.

State Bar Court Proposed Action
Recommendation Nos. 11.1 and 11.2 are responded to together below, under Recommendation No. 11.2.

Office of the Chief Trial Counsel Proposed Action
Recommendation Nos. 11.1 and 11.2 are responded to together below, under Recommendation No. 11.2.

[13]Recommendation No. 11.4, which suggests the Office of the Chief Trial Counsel should handle disciplinary appeals before the California Supreme Court, is not included herein, pending discussions directly with the California Supreme Court.

11.2 The factual determinations of the hearing department should stand unless there is evidence that findings of fact are clearly erroneous. The hearing judge's conclusions of law and recommended discipline should not be reversed unless the judge acted arbitrarily.

State Bar Court Analysis

Disagree. Rule 951.5 of the California Rules of Court provides, in relevant part, that "[u]pon review . . . of any decisions, orders or rulings by a hearing judge that fully disposes of an entire proceeding, the Review Department of the State Bar Court shall independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge."

The Supreme Court adopted rule 951.5 on February 28, 2000, in response to the Legislature's amendment of Business and Professions Code section 6086.65, subdivision (c) which, effective January 1, 2000, reduced the Review Department's standard of review from *de novo* (i.e., independent) review to a substantial evidence standard. The maintenance of the *de novo* standard is important because it is the same standard of review applied by the Supreme Court in its review of the State Bar Court's recommendations. Thus, if the Review Department were to apply a more deferential standard that than applied by the Supreme Court, there could be occasions where the Supreme Court is compelled to grant review of a proceeding simply because the Review Department could not, in applying a substantial evidence standard, make appropriate modifications to the findings of fact, conclusions or recommendation regarding discipline.

Office of the Chief Trial Counsel Analysis

Disagree. The Supreme Court has held that the current discipline system is reliable and is an important factor in the Supreme Court's ability to handle its caseload. (*See* e.g., *In re Rose* (2000) 22 Cal.4th 430, 457) It has rejected all constitutional challenges to the system, including those that asserted that the Supreme Court or the Court of Appeals must hear a case or the Supreme Court must file a written decision. Inferentially the Supreme Court's opinion is based, in part, on the structure of the current system, including the *de novo* nature of the review process by the Review Department.

Moreover, on February 28, 2000, the Supreme Court imposed Rule of Court 951.5, which holds that "the Review Department of the State Bar Court shall independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge."

State Bar Court Proposed Action
No action should be taken with respect to these recommendations.

Office of the Chief Trial Counsel Proposed Action
No action is proposed.

11.3 The appeals process should be expedited through promptly obtaining hearing transcripts and scheduling oral argument at the Review Department.

State Bar Court Analysis
Agree in Principle. When review of a Hearing Department proceeding is requested, the party seeking review must pay for the cost of the preparation of the reporter's transcript of the proceedings. The reporter's transcript is prepared by certified shorthand reporting firms with whom the State Bar Court has contracted. In most cases, the reporter's transcript is completed within thirty (30) days of receipt of the appellant's advance payment for the transcript. A party cannot seek review of a State Bar Court Hearing Judge's decision unless the requesting party pays for the transcript. Similarly, the Supreme Court will not grant review of a State Bar Court proceeding unless the party has exhausted review in the State Bar Court. Therefore, a party who cannot afford to pay for the reporter's transcript of the State Bar Court Hearing Department proceeding cannot obtain full review of that proceeding in either the Review Department or the Supreme Court.

In order to address this problem, upon an adequate showing of financial need, the Review Department will permit a respondent attorney who seeks review of a proceeding to pay for the reporter's transcript in installments. However, because the cost of the reporter's transcript must be paid at the time the transcript is completed, the transcript is not ordered until the respondent has paid at least a

substantial portion of the transcript cost. There are only two or three of these requests for installment payments per year.[14]

The State Bar Court also agrees, in principle, that oral argument should normally be set by the Review Department within approximately 90 days following the filing of the last appellate brief. However, matters which may affect the ability of the Review Department to meet that goal include (a) the size of the record in the particular case; (b) the number and/or complexity of the factual and legal issues in the case; (c) the Review Department's caseload at the time; and (d) whether a judicial transition is occurring at or about the time the matter is being set for oral argument.

Office of the Chief Trial Counsel Analysis

Agree. The Office of the Chief Trial Counsel strongly supports this proposal and recommends the following time lines: transcripts completed and sent to the parties within one month of the request for review being filed, and oral argument set by the Review Department within 90 days of the last brief being filed.

The Office of the Chief Trial Counsel also recommends that the time lines be implemented regardless of whether the appealing party has made a complete or partial payment for the transcript. In support of this, Office of the Chief Trial Counsel recommends an expedited motion practice for any request for a payment plan by an appealing attorney.

In addition, The Office of the Chief Trial Counsel recommends that disciplinary cases be given priority over reinstatement matters.

State Bar Court Proposed Action

No Board of Governors action is necessary to implement this recommendation.

[14]In the most serious cases, in which disbarment has been recommended, any delay caused by the need for installment payments does not result in public or client harm because the attorney is placed on involuntary inactive enrollment following the filing of the Hearing Department decision recommending disbarment and that inactive enrollment continues until the Supreme Court acts upon the final State Bar Court recommendation. (Bus. & Prof. Code, § 6007, subd. (c)(4).)

Office of the Chief Trial Counsel Proposed Action

Support the State Bar Court in adopting new procedures to promptly obtain hearing transcripts and schedule oral argument in the Review Department of the State Bar Court.

PROCEDURES
Recommendation 12

12.1 Disciplined lawyers should be required to pay for the costs of reinstatement proceedings.

State Bar Court Analysis

Should Be Studied. The State Bar Court recommends that, before any position is taken with respect to this recommendation, an analysis of the cost of reinstatement proceedings should be conducted. Under the current Discipline Cost Model adopted by the Board of Governors pursuant to Business and Professions Code section 6086.10, subdivision (b)(3), the costs imposed in disciplinary proceedings can vary from approximately $1,000 for a simple matter that is resolved prior to the filing of a notice of disciplinary charges to at least $6,000 for a matter in which review by the State Bar Court Review Department. If the Board approves the recommended update of the model, those costs will increase to nearly $14,000 for a matter in which review is requested. Moreover, those costs do not include the costs attributable to the State Bar's attorney employees or to any expert who may be retained in the matter.

If payment all of the costs associated with the proceeding are imposed as a condition of seeking reinstatement, it is unlikely that many former attorneys will be able to afford to seek reinstatement. While that is not necessarily a reason not to impose such costs, the State Bar Court recommends that some analysis of those costs be prepared before a decision on this recommendation is made.

Office of the Chief Trial Counsel Analysis

Agree. The "hard dollar costs" incurred by the Office of the Chief Trial Counsel, such as costs attributable to retrieval and copying of files and trial exhibits, expert witness fees, deposition costs, computer runs, etc., should be paid by the reinstatement petitioners.

State Bar Court Proposed Action

An analysis of the costs associated with reinstatement proceedings should be conducted.

Office of the Chief Trial Counsel Proposed Action

Seek legislative changes to permit the Office of the Chief Trial Counsel to require that reinstatement petitioners reimburse the Office of the Chief Trial Counsel for costs incurred in the reinstatement proceedings. Specifically, seek addition of legislation such as Business and Professions Code section 6068.10, (to allow Office of the Chief Trial Counsel to charge costs), and 6140.5(c) and 6140.7, (to require payment as a condition of reinstatement).

PROCEDURES

Recommendation 13

13.1 The State Bar, in its discretion, may report to the District Attorney's office any false and malicious reports and complaints made by anyone alleging ethical misconduct (Bus. & Prof. Code Section 6043.5). Business and Professions Code section 6043.5 should be repealed. Complainants should have absolute immunity for any communications made to the disciplinary agency, but this should not protect complainants who commit perjury or who make slanderous statements outside the disciplinary proceedings.

Office of the Chief Trial Counsel Analysis

Disagree. Historically, the State Bar has never made a report under this statute. Nor do we anticipate using it frequently, if at all, in the future. However, an egregious case may arise where the appropriate course of action would be to make the referral contemplated by the statute. Adopting the proposed recommendation would eliminate that possible course of action.

Office of the Chief Trial Counsel Proposed Action

No action is proposed.

PROCEDURES

Recommendation 14

14.1 The Office of the Chief Trial Counsel should ensure the complainants are provided notice of their dismissed complaints. Complainants should be able to request Office of the Chief Trial Counsel to reconsider a dismissed complaint, per Rule 2063.

Office of the Chief Trial Counsel Analysis

Recommendation Nos. 14.1 and 14.2 are responded to together below, under Recommendation No. 14.2.

Office of the Chief Trial Counsel Proposed Action

Recommendation Nos. 14.1 and 14.2 are responded to together below, under Recommendation No. 14.2.

14.2 Complainants should be given directions for requesting reconsideration in the closure letters, noting the circumstance under which such a request can be granted. This should decrease the number of requests for reconsideration.

Office of the Chief Trial Counsel Analysis

Agree. As discussed previously (in response to ABA Recommendation No 4.7), both Business and Professions Code section 6093.5 and Rule of Procedure 2403 require that the Office of the Chief Trial Counsel provide a complainant with information about the disposition of his/her complaint.

The Office of the Chief Trial Counsel closing letters have recently been revised to provide fuller and more case–specific explanations of the reasons for the closure. The letters also advise complainants of the "second look" (internal reconsideration) process. Some second looks have resulted in the case being reopened. If, however, the complainant sends additional information or requests a second look, and if the second look confirms that the file was properly closed, the complainant is sent another letter advising that he or she may file a petition with the Supreme Court of California requesting that it order the State Bar to reopen the file.

Office of the Chief Trial Counsel Proposed Action

Continue to notify complainants promptly and in detail about the dismissal of their complaints, the reasons for the dismissal, and the available remedies for reconsideration.

PROCEDURES

Recommendation 15

15.1 The term "moral turpitude" is subjective and should be eliminated from the statutes and rules relating to lawyer conduct and discipline.

State Bar Court Analysis

Disagree. The ABA Discipline System Consultation Team recommends that the term "moral turpitude" be eliminated from the statutes and rules relating to lawyer conduct and discipline. While acknowledging that the term "moral turpitude" is not unconstitutionally vague, the ABA Consultation Team asserts that it is "subjective" and may include conduct that does not necessarily relate to a lawyer's fitness to practice law. (ABA Report, at p. 45.)

The ABA Consultation Team's concern is misplaced. Business and Professions Code section 6106 provides that an attorney's commission of an act involving moral turpitude, dishonesty or corruption constitutes a cause for disbarment or suspension, whether or not the act was committed in the member's capacity as an attorney and whether or not the act constitutes a crime. However, the California Supreme Court has held on multiple occasions that the term "moral turpitude" must be given a meaning and content the is relevant to the attorney's fitness to practice. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815 (fn. 3); *In re Lesansky* (2001) 25 Cal.4th 11, 15; see also, *Morrison* v. *State Board of Education* (1969) 1 Cal.3d 214, 239.)

Office of the Chief Trial Counsel Analysis

Disagree. The term "moral turpitude" has been used in California statutes since 1880 (section 287 of the Code of Civil Procedure). At that time the reference to "moral turpitude" was limited to felony or misdemeanor convictions. The reference continued to be limited to convictions until 1911. The 1911 version of section 287 used "moral turpitude" in reference to convictions as a basis for removal or

discipline of attorneys, and included an additional subdivision as a basis for removal or disbarment: "For the commission of any act involving **moral turpitude**, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, **or otherwise**, and whether the same shall constitute a felony or misdemeanor **or not** . . . . " (Emphasis added.) In 1939, the provision added in 1911 was essentially adopted as section 6106 of the Business and Professions Code[15].

The term is also an integral part of the case law. As early as 1885, the California Supreme Court disbarred an attorney for spending his client's funds, not based on a conviction, but rather on "professional moral depravity. . . . " (*In RE W. B. Treadwell, Disbarment* (1885) 67 Cal. 353, 358; See additional cases where moral depravity or moral turpitude have been found in cases where there is no conviction: *Ex Parte George W. Tyler, On Habeas Corpus* (1895) 107 Cal. 78; *Llewellyn F. Marsh v. State Bar* (1930) 210 Cal. 303; *Charles Lantz v. State Bar* (1931) 212 Cal. 213; and *D.A. Jacobs v. State Bar* (1933) 219 Cal. 59.)

The State Bar Court Review Department has stated that moral turpitude is not a concept that fits a precise definition (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110). It has, however, been consistently described as an 'act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' (*In re Craig* (1938) 12 Cal.2d 93, 97.) The Court has characterized the moral turpitude prohibition as a flexible, 'commonsense' standard (*In re Mostman* (1989) 47 Cal.3d 725, 738). It is measured by the morals of the day (*In re Higbie, supra* [1972], 6 Cal.3d at p. 572) and may vary according to the community or the times. (*In re Hatch* (1937) 10 Cal.2d 147, 151.)

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[15]Bus. & Prof. Code § 6106 reads:

"The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor."

The elimination of the term "moral turpitude" would leave a serious void in the discipline law.

State Bar Court Proposed Action

No action is proposed with respect to this recommendation.

Office of the Chief Trial Counsel Proposed Action

No action is proposed.

15.2 Amend the State Bar Act and the Rules of Procedure to eliminate and replace with "serious crime" as defined in MRLDE 19.

State Bar Court Analysis

Disagree. The MRLDE defines "serious crime" as "any felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a 'serious crime.'"

The term "moral turpitude" has been included in disciplinary proceedings in California since at least 1885 (*In re Treadwell* (1885) 67 Cal. 353, 358) and has been extensively defined and interpreted in the context of attorney disciplinary proceedings. (See, *e.g.*, *In re O'Connell* (1920) 184 Cal. 584, 587; *In re Craig* (1938) 12 Cal.2d 93, 97; *In re Fahey* (1973) 8 Cal.3d 842, 849.)

The substitution of the term "serious crime" for the phrase "crime involving moral turpitude" would not provide any greater specificity or guidance. The term "serious crime" is used in the criminal law (see, *e.g.*, Pen. Code §§ 969f, 1192.8) and would cause greater uncertainty because of the lack of existing case law interpreting and applying that term in the context of attorney disciplinary proceedings.

Office of the Chief Trial Counsel Analysis

Disagree. The term and concept "moral turpitude" are used extensively in discipline law. The proposal implies that the term is used primarily regarding criminal convictions and that the term "serious crime" should be substituted for "moral turpitude."

The necessity of using the term "moral turpitude" in the discipline system, for other than criminal convictions is addressed in 15.1 above. The use of "moral turpitude" in dealing with criminal convictions is rooted in statutory and case law since 1880. The criminal system uses the term and it is present throughout the case law. While "moral turpitude" may be subjective, replacing it with "serious crime" does not appear to resolve the issue of it being a subjective term. "Serious crime" would simply provide a new subjective term, but without the statutory and case law history to assist in its interpretation. In addition, replacing "moral turpitude" with ''serious crime" would not address our original discipline cases that involve "moral turpitude."

State Bar Court Proposed Action

No action is proposed with respect to this recommendation.

Office of the Chief Trial Counsel Proposed Action

No action is proposed.

15.3 Rules and statutes should provide for the Supreme Court to enter an order of immediate interim suspension upon a finding of guilt (rather than on entry of judgment of criminal conviction).

Office of the Chief Trial Counsel Analysis

Disagree. Section 6101 of the California Business and Professions Code provides for the suspension of an attorney convicted of a felony, or a misdemeanor involving moral turpitude or where there is probable cause to believe the crime involved moral turpitude. Subsection 6101(e) provides that: "a plea or verdict of guilty, an acceptance of a nolo contendere plea, or a conviction after a plea of nolo contendere is deemed to be a conviction."[16]

Rules and statutes already effectively provide what is suggested in the proposal.

State Bar Court Analysis

Agree. The ABA Consultation Team's recommendation is already the state of the law in California. Business and Professions Code section 6101, subdivision (e) specifically provides that "a plea or verdict of guilty, an acceptance of a nolo contendere plea, or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of those Sections."

Office of the Chief Trial Counsel Proposed Action

No action is proposed.

State Bar Court Proposed Action

No action is necessary with respect to this recommendation.

[16]The exception to this definition of conviction occurs related to pleas made pursuant to Penal Code §§ 1000-1000.5 (the Penal Code sections which deal with specified drug offenses for which a deferred entry of judgment drug program is an available remedy). For those offenses, a plea of guilty shall not constitute a conviction unless and until a judgment of guilty is entered. (Penal Code § 1000.1(d)).

PROCEDURES

Recommendation 16

16.1 The Supreme Court should appoint a task force to revise and compile in one document all of the Rules of Professional Conduct and statutes governing lawyer conduct, and the rules of procedure relating to the discipline system. Superseded rules or statutes should be published, if at all, after the current rule instead of before it.

State Bar Court Analysis

No Opposition. Currently, West's and Deering's Annotated Codes publish the State Bar Act as part of the Business and Professions Code. The Rules of Court, Rules of Professional Conduct and Rules of Procedure of the State Bar of California are all published as part of the volumes relating to "Court Rules." Publication of these statutes and rules in a single volume is impractical in light of the current organization of these annotated codes.

However, the State Bar currently publishes Publication 250, which includes the Rules of Professional Conduct, the State Bar Act and the California Rules of Court relating to the State Bar and attorney discipline. The Rules of Procedure are separately published by the State Bar Court. While the Rules of Procedure could be included in Publication 250, those rules are of interest primarily to those attorneys against whom disciplinary proceedings are pending, a relatively small percentage of the total attorney population. Inclusion of the Rules of Procedure in Publication 250 would probably significantly increase its cost and might result in a reduction in sales of the publication.

Finally, it should be noted that both all of these documents are available through the State Bar's website.

Office of the Chief Trial Counsel Analysis

No Opposition. The Office of the Chief Trial Counsel has no opposition to this recommendation. Currently, however, the California Rules of Professional Conduct, the State Bar Act, applicable Rules of Court and other statutes, *are* complied into one publication (Publication 250, "the Grey Book") that is available to attorneys and the public. The Grey Book contains both current and prior Rules and lists the effective date of the various Business and Professions Code sections that comprise the State Bar Act.

The Rules of Procedure, which are adopted by the Board of Governors and apply to proceedings in the State Bar Court, are published in a separate booklet along with miscellaneous rules governing conflicts of interest, confidentiality and rules germane to the overall disciplinary system.

Both the Rules of Professional Conduct and the Rules of Procedure are periodically reviewed to update them and to make them more understandable. In fact, the California Rules of Professional Conduct are currently being reviewed, as part of Ethics 2000, to determine what revisions, if any, should be made.

State Bar Court Proposed Action

No action on this recommendation is needed at this time.

Office of the Chief Trial Counsel Proposed Action

No action appears to be needed at this time.

ALTERNATIVE PROGRAMS

Recommendation 17

17.1 The State Bar and local bar associations should bring their resources and expertise to the operation of alternatives to discipline programs.

Office of the Chief Trial Counsel Analysis

The Office of the Chief Trial Counsel agrees that programs offering alternatives to discipline should be expanded and enhanced in order to better address the public's dissatisfaction with the summary dismissal of complaints involving minor misconduct. In addition to long-standing programs in The Office of the Chief Trial Counsel such as Ethics School and Client Trust Accounting School, several new programs offering alternatives to formal discipline are underway or in the process of being developed.

As the result of recent legislation, the State Bar established an attorney diversion and assistance program called LAP (the Lawyer Assistance Program). The purpose of LAP is to provide services for the treatment and recovery of attorneys due to substance abuse and mental illness. The Office of the Chief Trial Counsel has worked closely with LAP and the State Bar Court to develop protocols for integration of treatment into the Office of the Chief Trial Counsel's disciplinary response to impaired respondent attorneys.

In May 2002, the Office of the Chief Trial Counsel began an ADR/Mediation pilot project in four Northern California counties (including San Francisco, Alameda, Contra Costa and Marin) through an outside arbitration/mediation group, California Community Dispute Services.

Office of the Chief Trial Counsel Proposed Action

The Office of the Chief Trial Counsel will continue to seek to implement effective and appropriate alternatives to the disciplinary system and will also continue to support and work fully with programs developed by either the State Bar or local bar associations.

SANCTIONS

Recommendation 18

18.1 Private reproval after the filing of a Notice of Disciplinary Charges should be eliminated.

Office of the Chief Trial Counsel Analysis

Agree. The issuance of a private reproval after the filing of a Notice of Disciplinary Charges is inconsistent with fact that a Notice of Disciplinary Charges has been filed. The filing of a Notice of Disciplinary Charges makes the proceeding public. The issuance of a private reproval after the filing of formal charges attempts to make the proceeding private again to a certain extent, although information about the issuance of the private reproval is available to the public pursuant to rule 270(c), Rules of Procedure. This result is inconsistent with Bus. and Prof. Code section 6086.1, which makes the hearings and records of original disciplinary proceedings public, following a notice to show cause. Little, if any, justification exists for this contortive procedure.

State Bar Court Analysis

Divided Recommendation. State Bar Court judges are divided on this issue. In October 2001, the State Bar Court judges voted 5–3 that private reprovals after the issuance of the Notice of Disciplinary Charges should be retained. There are valid arguments to be made for either retaining or eliminating these post–NDC private reprovals.

Business and Professions Code section 6078 provides that the board has the power to impose public and private reprovals. That power has been statutorily delegated to the State Bar Court. (Bus. & Prof. Code, § 6086.5.)

Business and Professions Code section 6086.1 provides that the hearings and records of all disciplinary proceedings are public following the filing of the notice of disciplinary charges or other initiating document. As a result, the imposition of a "private reproval" after a notice of disciplinary charges has been filed can be confusing or misleading because the reproval isn't "private" but, rather, is available to the public upon request. A requirement that all reprovals following the filing of a notice of disciplinary charges be public reprovals would eliminate that confusion.

On the other hand, private and public reprovals have long been considered and imposed as separate levels of discipline, with a "private" reproval being imposed for misconduct that is considered less serious than in the case of a "public" reproval. By eliminating private reprovals following the filing of the notice of disciplinary charges, misconduct that has long been considered worthy of only a "private" reproval would now warrant a "public" reproval.

Moreover, the Office of the Chief Trial Counsel determines whether or not to file a notice of disciplinary charges. The respondent attorney may offer to stipulate to a private reproval prior to the filing of the NDC but the offer may be rejected by the Office of the Chief Trial Counsel, even if that disposition has been recommended by a State Bar Court judge during the early neutral evaluation process. By filing the NDC, the Office of the Chief Trial Counsel can unilaterally preclude the imposition of a private reproval, even if that was the appropriate disposition.

Office of the Chief Trial Counsel Proposed Action

A change in the Rules of Procedure is required. The Rules of Procedure should provide that once a Notice of Disciplinary Charges has been filed, a private reproval is no longer an available disposition in a disciplinary proceeding.

State Bar Court Proposed Action

As of October 2001, a majority of the State Bar Court judges favored retaining private reprovals after the filing of the NDC. Therefore, no action is recommended at this time.

18.2 Admonitions should be eliminated.

Office of the Chief Trial Counsel Analysis

Agree. The use of an admonition in State Bar disciplinary proceedings is both outdated and rare. Essentially, an admonition is a dismissal of the proceeding. It does not constitute the imposition of discipline. The value and utility of an admonition in a disciplinary proceeding is unclear. The significance and meaning of an admonition in the disciplinary process is unclear. As such, an admonition does not further the goals of attorney discipline. If there are insufficient grounds to impose discipline upon an attorney, based upon the matters alleged, the matter should be dismissed and nothing further should be done.

State Bar Court Analysis

Agree. Admonitions do not constitute discipline. (Rule 262(d), Rules Proc. of State Bar.) An admonition following the issuance of a notice of disciplinary charges is rare and is only appropriate in those cases where the State Bar Court determines that (a) the proceeding does not involve "a serious offense"; (b) the violation was not intentional or occurred under mitigating circumstances; and (b) no significant harm resulted.

If the admonition is eliminated, the State Bar Court judge will have to determine whether the appropriate disposition is a private reproval or a dismissal of the proceeding. If private reprovals are the filing of a notice of disciplinary charges is eliminated, the issue for the State Bar Court judge will be whether the conduct warrants the imposition of a public reproval.

Office of the Chief Trial Counsel Proposed Action

A change in the Rules of Procedure is required. The Rules of Procedure should be change to eliminate admonitions.

State Bar Court Proposed Action

A change in the Rules of Procedure is required.

SANCTIONS

Recommendation 19

19.1 Substantive revisions to the Standards should be made and submitted for adoption by the Supreme Court.

State Bar Court Analysis

Agree. The Standards for Attorney Sanctions for Professional Misconduct were adopted by the Board of Governors, with the approval of the Supreme Court, in 1986. At that time, adjudication in attorney disciplinary proceedings was conducted by approximately 400 volunteer attorneys, public members and retired judges sitting as individual referees or three-member hearing panels. All decisions of these referees or hearing panels were reviewed by an 18-member volunteer Review Department. Because of the large number of adjudicators, there were significant disparities in recommended discipline, even in cases where the conduct was substantially similar. The Sanction Standards were adopted as a means of promoting greater consistency in disciplinary recommendations.

The need for Sanction Standards is significantly reduced under the current State Bar Court, since all disciplinary proceedings are heard by one of five full–time Hearing Judges and appellate review is available by a three-member Review Department. There is significantly greater consistency under the full-time Court than existed under the volunteer system.

Nevertheless, although they are not binding, the Sanction Standards can provide important guidance for the Court and the parties in the proceedings. The State Bar Court is currently working on a proposed comprehensive revision of the Sanction Standards, which it expects to complete within the next several months.

Office of the Chief Trial Counsel Analysis

Agree. The Office of the Chief Trial Counsel has submitted a revised version of the standards. At the direction of the California Supreme Court, additional suggested revisions will be made.

State Bar Court Proposed Action

When the proposed revisions to the Sanction Standards have been completed, they will be shared with the Office of the Chief Trial Counsel and Respondent's Bar and, thereafter, will be brought to this Committee for its consideration.

Office of the Chief Trial Counsel Proposed Action

No action is proposed.

STATE BAR COURT
HEARING DEPARTMENT

	)	Case No. _____
In the Matter of _____,	)	
No. _____	)	DECISION ON DEFAULT
	)	
A Member of the State Bar	)	
_____	)	

1. **Service**. The Court finds that respondent was properly served with the Notice of Disciplinary Charges, that respondent did not file a timely response, and that default was properly entered.

2. **Jurisdiction.** Respondent is, and at all times mentioned herein was, a member of the State Bar of California.

3. **Findings of Fact.** The Court finds that the facts alleged in the Notice of Disciplinary Charges are true. These facts are incorporated in this decision by reference.

4. **Conclusions of Law.**

The Court finds respondent culpable of all of the charges contained in the Notice of Disciplinary Charges except as set forth below:

ATTACHMENT A

☐ The following counts are dismissed because the Court finds that they are duplicative to other allegations contained in the Notice of Disciplinary Charges

_____

☐ The following counts are dismissed because the Court finds that the Notice of Disciplinary Charges does not state a disciplinable offense and/or give sufficient notice of the charges:

_____

☐ The following counts are dismissed in the furtherance of justice upon the motion of the State Bar of California:

_____

☐ The following counts are dismissed for the reasons set forth below:

_____

5. **Findings in Mitigation and Aggravation.** The Court makes the following findings in mitigation and aggravation. The facts supporting these findings are found in the notice of disciplinary charges and the documentary evidence submitted to the Court and incorporated herein by this reference:

☐ Absence of prior discipline (Standard 1.2(e)(i))

☐ Prior record of discipline (Standard 1.2(b)(i))

☐ Multiple acts of wrongdoing (Standard. 1.2(b)(ii))

☐ Pattern of misconduct (Standard. 1.2(b)(ii))

☐ Misconduct surrounded by bad faith, dishonesty, concealment or overreaching or other violations (Standard 1.2(b)(iii))

☐ Refusal or Inability to account (Standard 1.2(b)(iii))

☐ Significant harm to client, public or administration of justice (Standard 1.2(b)(iv))

☐ Indifference to rectification or atonement (Standard 1.2(b)(v))

☐ Lack of candor and cooperation to victims (Standard 1.2(b)(vi))

☐ Lack of candor and cooperation to State Bar (Standard 1.2(b)(vi))

☐ Other _____.

ATTACHMENT A

6. **Authorities Supporting Disciplinary Recommendation:**

_____
_____

7. **Disciplinary Recommendation.** The Court recommends to the Supreme Court that the following discipline be imposed:

A. ☐ Disbarment

It is recommended that respondent be disbarred from the practice of law.

B. ☐ Suspension and Probation

It is recommended that respondent be suspended from the practice of law for _____, and that execution of the suspension be stayed and that respondent be actually suspended from the practice of law for and until the State Bar Court grants a motion to terminate respondent's actual suspension pursuant to rule 205, Rules of Procedure of the State Bar, and until:

☐ Respondent makes restitution to _____ (or the client security fund if appropriate) in the amount of $_____, plus 10% interest per annum from _____ and furnishes satisfactory proof thereof to the Probation Unit, State Bar Office of the Chief Trial Counsel;

☐ Respondent does as follows:
_____

☐ It is further recommended that respondent be ordered to comply with such probation conditions as are reasonably related to this proceeding that hereinafter may be imposed by the State Bar Court as a condition for terminating his actual suspension.

ATTACHMENT A

C. Multistate PRE (Suspension Recommendations Only).

☐ It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court's order or during the period of his or her actual suspension, whichever is longer.

☐ It is not recommended that respondent be ordered to take and Pass the Multistate Professional Responsiblity Examination because respondent was ordered to do so previously in case number _____.

D. Costs. It is further recommended that costs be awarded to the State Bar.

E Standard 1.4(c)(ii)

☐ If the period of actual suspension reaches two years, respondent shall remain actually suspended until she has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

☐ Respondent shall remain actually suspended until she has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

ATTACHMENT A

F. California Rule of Court 955

☐ If the period of actual suspension exceeds 90 days, it is recommended that respondent be ordered to comply with California Rule of Court 955, and to perform the acts described in subdivisions (a) and (c) within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

☐ It is recommended that respondent be ordered to comply with Rule 955 of the California Rules of Court and to perform the acts described in subdivisions (a) and (c) of rule 955 within thirty and forty days, respectively, after the effective date of the Supreme Court order in this proceeding.

Dated:_____ _____

Judge of the State Bar Court

ATTACHMENT A